(1)

Supreme Court, U.S.
FILED

94 701 OCT 11 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

WALTER B. NELSON AND MARY E. NELSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Court

PETITION FOR WRIT OF CERTIORARI

PETER W. HALL, ESQ.
Counsel of Record
SHANNON A. BERTRAND, ESQ.
On the Brief
ABELL, KENLAN, SCHWIEBERT & HALL, P.C.
71 Allen Street
P.O. Box 578
Rutland, Vermont 05702-0578
(802) 773-3300
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I. WHETHER THE SECRETARY OF THE INTERIOR ACTED OUTSIDE THE SCOPE OF HIS STATUTORY AUTHORITY AND ABUSED HIS DISCRETION UNDER 16 U.S.C. § 1246(g) IN CONDEMNING 16.03 ACRES OF LAND IN FEE FROM PETITIONERS WALTER AND MARY NELSON WHEN THE GOVERNMENT REPEATEDLY ADMITTED THAT 16.03 ACRES OF LAND IN FEE WAS NOT NEEDED TO EFFECTUATE THE PURPOSES OF THE NATIONAL TRAILS SYSTEM ACT WHICH LIMITS THE SECRETARY TO TAKING ONLY SUCH TITLE AS, IN HIS JUDGMENT, IS REASONABLY NECESSARY TO PROVIDE PASSAGE ACROSS PETITIONERS' LAND AND WHEN THE GOVERNMENT'S AGENT AND SOLE WITNESS STATED UNDER OATH THAT AS FEW AS 10.95 ACRES IN FEE ADEQUATELY PROTECTED THE CORRIDOR AND PROVIDED PASSAGE FOR THE TRAIL?

PARTIES TO THE PROCEEDING

The United States of America, Department of the Interior, and Walter B. Nelson and Mary E. Nelson were the only parties to this action in the United States Court of Appeals for the Second Circuit. Although listed in the caption to the Court of Appeals, the Town of Shrewsbury and Unknown Others did not take part in the appeal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
DECISIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	17
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Brown v. Piper, 91 U.S. 37 (1875) 17

City of Cincinnati v. Vester, 281 U.S. 439 (1930) 12

McDonald v. Thompson, 305 U.S. 263 (1938) 11

National R.R. Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394 (1992) 10

National Wildlife Fed'n v. Interstate Commerce Comm'n, 850 F.2d 694 (D.C. Cir. 1988) 15

Rice Barton Corp. v. United States, 88 F.2d 271 (Cl. Ct. 1950) 14

Sherwin v. United States, 436 F.2d 992 (Cl. Ct. 1971) 15

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 17

STATUTES

16 U.S.C. § 1241 et seq. 6

16 U.S.C. § 1244(a)(1) 3

16 U.S.C. § 1246(a)(2) 15

16 U.S.C. § 1246(f)(2) 12

16 U.S.C. § 1246(g) ..... *passim*

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1358 1

RULES

Sup. Ct. R. 13 1

Fed. R. Evid. 201 17

PETITION FOR WRIT OF CERTIORARI

Petitioners Walter B. Nelson and Mary E. Nelson pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

DECISIONS BELOW

The decision of the United States District Court for the District of Vermont, ordering condemnation of 6.7 acres of land in fee, is unreported and is reprinted in the Appendix of this Petition at App. 30 through App. 34. The decision of the Court of Appeals for the Second Circuit, reversing the District Court's Order, is reported at 26 F.3d 349 and is reprinted in the Appendix at App. 1 through App. 24.

JURISDICTION

The jurisdiction of the United States District Court for the District of Vermont was based upon 28 U.S.C. § 1358 (eminent domain). The final judgment of the District Court was filed June 10, 1992. The United States filed a Notice of Appeal on August 10, 1992. The Court of Appeals for the Second Circuit issued its decision reversing the District Court on June 14, 1994. Walter and Mary Nelson filed a timely Motion for Rehearing on June 27, 1994. The Motion for Rehearing was denied July 13, 1994. The instant Petition for Certiorari is timely pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is based upon the

final decision of the United States Court of Appeals for the Second Circuit and is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES

The instant matter raises questions regarding the Secretary of the Interior's power to condemn land for the use of the National Trails System pursuant to 16 U.S.C. § 1246(g), which is reprinted below.

> **Condemnation proceedings to acquire private lands; limitations; availability of funds for acquisition of lands or interests therein; acquisition of high potential, route segments or historic sites.**
>
> The appropriate Secretary may utilize condemnation proceedings without the consent of the owner to acquire private lands or interests therein pursuant to this section only in cases where, in his judgment, all reasonable efforts to acquire such lands or interests therein by negotiation have failed, and in such cases he shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands: *Provided,* That condemnation proceedings may not be utilized to acquire fee title or lesser interests to more than an average of one hundred twenty-five acres per mile. Money appropriated for Federal purposes from the land and water conservation fund shall, without prejudice to appropriations from other sources, be

available to Federal departments for the acquisition of lands or interests in lands for the purposes of this chapter. For national historic trails, direct Federal acquisition for trail purposes shall be limited to those areas indicated by the study report or by the comprehensive plan as high potential root segments or high potential historic sites. Except for designated protected components of the trail, no land or site located along a designated national historic trail or along the Continental Divide National Scenic Trail shall be subject to the provisions of Section 303 of Title 49, unless such land or site is deemed to be of historic significance under appropriate historical site criteria, such as those for the National Register of Historic Places.

STATEMENT OF THE CASE

The United States government ("government") has sought to condemn land owned by Petitioners pursuant to the condemnation provision of the National Trails System Act. ("Act"). 16 U.S.C. § 1246(g). The general purpose of such taking is for a corridor through Vermont along the Appalachian Trail. The Act vests primary responsibility for administering the Appalachian Trail with the Secretary of the Interior ("Secretary"), in consultation with the Secretary of Agriculture. 16 U.S.C. § 1244(a)(1). The Secretary has the power to acquire lands by voluntary sales, by other agreements or, as a last resort, by condemnation.

Pursuant to the requirements of the statute, the National Park Service entered into negotiations with the

Petitioners to acquire 34.30 acres of land in Shrewsbury, Vermont. During negotiations, the Park Service agreed to reduce the amount of land it sought to 16.03 acres. It did not seek the full 16.03 acres in fee, however, but agreed to acquire 11.57 acres in fee and 4.46 acres by permanent easement. App. at 47. Although the form of the taking was agreed upon, the deal was never completed because the parties did not agree on final financial terms.

On September 1, 1990, the government filed a Complaint and Notice of Condemnation, naming as respondents Walter B. Nelson and Mary E. Nelson ("the Nelsons"). The Complaint and Notice of Condemnation sought to condemn, not in combined fee and easement as previously agreed upon, but entirely in fee 16.03 acres of the Nelsons' land in Shrewsbury, Vermont. App. at 56-57. The Nelsons filed an Answer to the Complaint objecting to the condemnation in fee of the 16.03 acres of their property. They asserted that the government had been arbitrary and capricious, vindictive and had acted in bad faith because the government had recanted its earlier condemnation proposal to take part of the land in fee and part by easement.

The Nelsons prayed that the government be restricted to a condemnation of the 16.03 acres partially in fee and partially by easement, and thereby they attempted to hold the government to the form of taking that the government had specified as necessary when its representatives were trying to negotiate a price with the Nelsons. App. at 47. The government neither objected to nor attempted to dismiss the Nelsons' Answer which asserted that the form of the taking was overreaching and unnecessary. Subsequently, the Nelsons filed a Motion to

Amend their Answer and an accompanying Amended Answer. The Amended Answer not only asserted that the nature of the government's condemnation was arbitrary and capricious, vindictive and in bad faith, but also pleaded more specifically:

> that the entire proposed taking of 16.03 acres in fee is far more acreage than "is reasonably necessary to provide passage across" the lands of the defendants, [Nelsons] and a much lesser taking, as proposed by the cross-hatched section on the diagram/map attached hereto and incorporated by reference as exhibit C, which taking would give the Government approximately 200 feet of road frontage on Town Highway #5 [sic] and be bounded on the southerly side by Parcel 213-17, formerly lands of Walsh, will provide a width of corridor for the trail where it now exists, which is wholly adequate "to protect the integrity of the trail."

App. at 38-39. Once again, the government did not oppose such amendments to the Nelsons' Answer. The trial court found that "the government does not oppose the Motion" and allowed the amendments. App. at 52.

Yet again, before hearing, the Nelsons put the issue of the "necessity and the appropriate scope of the government's condemnation" before the court after discovery was completed. The Nelsons moved for a bifurcation of the issues of the necessity of the taking and of compensation for the taking. Again, the government made no objection to that motion regarding a separate hearing on the necessity of the taking and presentation of evidence by both the government and respondents on that issue. The District Court ordered "the trial shall be bifurcated

such that a determination will first be made on the extent of condemnation reasonably necessary." App. at 52.

Three months after the government had been put on notice that the issue of the necessity of the condemnation was going to be tried first, and separately, from the issue of just compensation, the District Court held a hearing on the form and necessity of the proposed condemnation of the Nelsons' land. At no time before or during these proceedings did the government object to the procedure being used or to the nature of the proceeding itself. Rather, the government implicitly acknowledged its burden to go forward by presenting its case first and calling, as its only witness, Donald T. King. Mr. King testified that he was "in charge of the National Parks [sic] Service Land Acquisition Program for the Appalachian Trail." App. at 69. The government went forward first and attempted to meet its burden to justify the acquisition of the 16.03 acres in fee of the Nelsons' property.

In the entire proceeding, the government presented *no* witness who testified that 16.03 acres of land was reasonably necessary to effectuate the purposes of the National Trails Act. 16 U.S.C. § 1241 *et seq.* Despite the government's ready access to all personnel in the National Park Service, and likely because there was no other better qualified witness, the government chose to present "the person in charge of the . . . land acquisition program for the Appalachian Trail" as its only witness on the issue of necessity. Upon cross-examination, that witness testified that the Park Service set out to acquire such property as was necessary to provide passage and to

protect the trail and that the Service would not try voluntarily to acquire less land than was needed to protect the integrity of the trail. App. at 75-76.

During his examination at the evidentiary hearing, the witness, Donald King, testified that the government had initially considered acquiring 34.30 acres of land, but had decided that less acreage would suffice to protect the trail. Mr. King specifically testified that a taking of 11.57 acres in fee and of 4.46 acres by easement would provide the protection necessary for the trail. App. at 84-86. He further stated that a 10.95 acre condemnation in fee would be adequate to protect the corridor and passage for the trail. App. at 86.

Based upon Donald King's testimony, and other documentary evidence, the District Court found that "the government has continuously throughout this entire proceeding changed the number of acres which the government seeks to acquire." App. at 33. The District Court went on to rule that the 16.03 acres was not necessary to protect the passage of the trail and that 6.7 acres would provide all the protection that was reasonably necessary. App. at 33. The government did not offer, and in the face of Donald King's contrary testimony could not have offered, any evidence that 16.03 acres of land in fee were reasonably necessary adequately to protect the purposes stated in the Act and the Appalachian Trail itself. The government had, by its earlier actions determined that a combination of fee and easement was all that the government needed, and later, through testimony of its own witness, the person in charge of trail corridor acquisition, admitted that as few as 10.95 acres in fee were all that were necessary to provide passage for the trail.

The United States appealed from the District Court's decision, claiming that the District Court could not review the Secretary's decision to condemn a fee estate in a particular parcel of land and that, if such decision was reviewable, the District Court could not revise the quantity of land or interest in land reasonably necessary for the trail.

On June 14, 1994, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court. The Court of Appeals ruled that the Secretary's condemnation decision pursuant to 16 U.S.C. § 1246(g) was subject to judicial review. App. at 10. It further ruled that the appropriate scope of review to be applied was an "ultra vires" standard. App. at 14. That standard required "the reviewing court to ascertain the scope of the acting officials' statutory authority and determine whether the officials' action conformed with their authority." App. at 12.

After it concluded that the Secretary conformed to his legislative grant of authority, the Court of Appeals further ruled that "the court may still consider the manner in which he exercised that authority," that is, whether the Secretary abused his authority. App. at 14.

The Court of Appeals then determined that the District Court's decision was clearly erroneous because the District Court required the government to take only the "minimal interest" in land necessary to protect the trail and passage across lands. The Court of Appeals found that the standard "imposes limitations on the Secretary's authority that have no basis in statutory or case law." App. at 20.

That court also found, although there had been no prior or contemporaneous objections to such evidence, that the District Court had improperly relied upon evidence admitted at the hearing on the necessity of the condemnation. App. at 22-23. After concluding that Walter Nelson's testimony about the amount of land reasonably necessary was irrelevant, the Court of Appeals went on to state that the District Court's reliance on the government's own witness's testimony was also improper. App. at 23. Despite the fact that *no* other evidence was offered of what amount of land was reasonably necessary to achieve the purposes of the Trail Act, the Court of Appeals ruled that the District Court erred in considering the government's sole witness's repeated testimony that 16.03 acres of land in fee was not needed to provide for reasonable passage of the trail or to protect other values sought to be protected by the Act.

The Court of Appeals determined that no matter what evidence was presented, the Complaint seeking 16.03 acres of land, standing alone and unverified by the Secretary or any of his agents, was sufficient to justify a finding that 16.03 acres of the Nelsons' land needed to be condemned. It is from this decision of the Court of Appeals that the Nelsons pray for a writ of certiorari. At stake are private persons' property rights and these citizens' ability to prevent the government from condemning land that the government repeatedly acknowledged it does not need when the government's agent and only witness has testified that 10.95 acres adequately protects the trail passage and corridor.

ARGUMENT

I. THE SECRETARY OF THE INTERIOR WENT BEYOND THE SCOPE OF HIS AUTHORITY AND ABUSED HIS DISCRETION IN SEEKING 16.03 ACRES IN FEE FROM PETITIONERS WHEN THE GOVERNMENT ADMITTED BEFORE AND DURING THE CONDEMNATION HEARING THAT IT DID NOT REQUIRE 16.03 ACRES OF LAND IN FEE TO EFFECTUATE THE PURPOSES OF THE NATIONAL TRAILS SYSTEM ACT NOR TO PROVIDE REASONABLE PASSAGE FOR THE APPALACHIAN TRAIL AND WHEN THE GOVERNMENT'S AGENT AND SOLE WITNESS STATED UNDER OATH THAT AS FEW AS 10.95 ACRES IN FEE ADEQUATELY PROTECTED THE CORRIDOR AND PROVIDED PASSAGE FOR THE TRAIL.

The Secretary went beyond his statutory authority and also abused the discretion that he was given under 16 U.S.C. § 1246(g) when he attempted to condemn land that the government admitted was not reasonably necessary under the Act.

The Secretary has discretion to determine what land is necessary. A reviewing court, however, must still determine whether the Secretary's action was reasonable. *See, National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992). Here, the District Court correctly found that the Secretary's decision to condemn land in excess of that necessary to protect the Trail was not reasonable. However, the Court of Appeals reversed that decision because it found that the District Court had committed clear error in so finding. This Court cannot allow the Secretary to take arbitrarily whatever lands he chooses in a total absence of evidence, and in fact with

the government's evidence to the contrary, that such lands are necessary to be taken under the statute

The Act is neither silent nor ambiguous regarding what land can be condemned by the Secretary for use of the Trail. The Secretary is authorized to acquire "only such title as, in his judgment, is reasonably necessary to provide passage across such lands". 16 U.S.C. § 1246(g). While the Secretary is granted discretion, it is not unfettered discretion. In the case at hand, the Secretary's actions cannot withstand even the limited scrutiny provided under the standards for reviewing ultra vires and arbitrary and capricious acts, because the government admitted that it did not need 16.03 acres of land in fee to effectuate the purposes of the Act and to protect the Appalachian Trail. App. at 84-86. The Secretary, by going beyond the limiting language of the statute, as shown by the undisputed evidence in this case, clearly abused his discretion under 16 U.S.C. § 1246(g).

A statute must be interpreted so that every word of it is given effect. *McDonald v. Thompson*, 305 U.S. 263, 266 (1938). Here, the limiting language, "*only such title* as, in his judgment, is *reasonably necessary* to provide passage across such lands" limits the Secretary's discretion. 16 U.S.C. § 1246(g). The Secretary cannot simply ignore such limiting language and take private land in the total absence of, and, in fact, in a manner contradictory to, any evidence whatsoever that such land is reasonably necessary. In this case, the only recital of the necessity of taking 16.03 acres of land in fee is contained in the Complaint in Condemnation. App. at 55-59. The Complaint is neither signed nor verified by the Secretary. The condemnation of a private person's land should not be sustained on a

"bare recital" that such land needs to be taken. *See, City of Cincinnati v. Vester*, 281 U.S. 439, 447 (1930). In *Vester*, this Court found that to allow condemnation upon a "bare recital" would do away with any express conditions upon which the authority to condemn land was granted. *Id.* This Court cannot allow the government to take private persons' land upon such bare recital where the negotiations and admissions of the government show that it does not need all the land that it seeks.

The Secretary's agents negotiated with the Nelsons in an attempt to acquire the land short of condemnation, as is required by 16 U.S.C. § 1246(g). During negotiations, the government sought *less* than 16.03 acres of land in fee. App. at 47. Obviously, it would not and could not have done so if it were necessary to have the entire 16.03 acres in fee. The acts of the Secretary and those acts taken in his name, and the testimony given on his behalf demonstrate unequivocally that the Secretary abused his power by attempting, through condemnation, to acquire land in excess of the limited title he was allowed to take under 16 U.S.C. § 1246(g).

In this case, the Court of Appeals failed to consider that the government's mandate, when it seeks to acquire land for the Appalachian Trail, whether voluntarily or by condemnation, must be to acquire at least enough land "to provide passage across such lands". 16 U.S.C. § 1246(g). In a *voluntary* or *cooperative* situation, the Secretary can acquire property in excess of that which is necessary. *See*, 16 U.S.C. § 1246(f)(2). The government, whether acting through the Secretary himself, or through his minions charged specifically with acquiring land for the Trail, cannot and does not seek to obtain less land or lesser

interests in land than that which is needed to provide adequate passage and protection for the Trail consistent with the purposes of the statute and the Department's Land Protection Plan Agreement.

When, as a statutorily permitted *last resort*, the power of condemnation is utilized, the express limitations upon the Secretary's discretion require the government to show at least that the 16.03 acres of land is reasonably necessary for a public purpose before that land can be taken by condemnation. What land is "necessary" cannot and does not vary according to the whim of the persons seeking to acquire passage. The *amount* of acreage necessary is the only consideration that the Secretary is required or allowed to make. The amount of, and interest in, acreage is *not* contingent upon a negotiated price for such acreage or upon whether the landowners cooperate with the government. Thus, the fact that the Nelsons and the government were not able to reach a negotiated price for the acreage interests that the government sought cannot be used to change a determination of necessity and increase the *amount* of land acquired. When the government condemns additional acreage or additional fee interests because a landowner is unwilling to agree with the government on a price for the land, the government, clearly, is both going beyond its statutory authority and acting arbitrarily and capriciously.

At the hearing on the necessity of the taking, Donald T. King, the *only* witness called by the government, conceded that lesser quantities or less than fee title in a portion of the land would be acceptable under the Act. App. at 84-86. While conceding that a lesser quantity or title interest in the land would be sufficient to satisfy the

requirements of the statute, the government persisted in these proceedings to seek to acquire land beyond that lesser amount. Mr. King's testimony supports the Nelsons' assertion that the Secretary's action abused the limited discretion given the Secretary to acquire "only such title" as is reasonably necessary, 16 U.S.C. § 1246(g), and was arbitrary and capricious.

Importantly, it was the *government* that called Donald King as a witness. The government was free to call as a witness whomever it chose. It is unreasonable that the government not be held to the evidence that its own witness provided.

The government's witness, Donald King, is in charge of the National Park Service Land Acquisition Program for the Appalachian Trail. App. at 69. He has worked for the Park Service since 1969 and has held his position with the Acquisition Office since 1989. App. at 69. The government did not offer the Secretary as a witness and made no attempt to offer testimony from any other party. Further, the government did not offer any documentation or sworn affidavit from the Secretary regarding his exercise of judgment that condemnation of the 16.03 acres of land in fee was reasonably necessary. That the government made no attempt to call the Secretary or any other party as a witness, that the government failed to object and proceeded first with its proof and that the government proffered its own witness all leave the court free to conclude that any such other witness would not have given testimony any more favorable to the government. *Rice Barton Corp. v. United States*, 88 F.2d 271, 275 (Cl. Ct. 1950). "[I]n light of the government's unexplained failure

to call [the Secretary or any other party] as a witness . . . or to arrange to have his testimony made a part of the administrative record by deposition, it is reasonable to conclude that, had he been called, he would not have given testimony more favorable to the government." *Sherwin v. United States*, 436 F.2d 992, 1005 (Cl. Ct. 1971).

The courts cannot simply acquiesce to the government's unsupported assertion that a certain parcel of land is necessary for the trail. *National Wildlife Fed'n v. Interstate Commerce Comm'n*, 850 F.2d, 694, 699 n.6 (D.C. Cir. 1988). Based upon the only evidence offered by the government at the hearing on the necessity of the taking, the District Court was correct in finding that "the fact is that at some time during this condemnation process, an agent of the National Park Service bureaucracy, situated in his office in West Virginia, made an arbitrary decision as to what amount of land should be condemned." App. at 33.

It is difficult to see how the Court of Appeals could find that the Secretary did *not* go beyond the statutory limitations and abuse his discretion when the government admitted that it did not require 16.03 acres of land in fee to accomplish the purpose of the Act. Mr. King stated that the government would have accepted less than 16.03 acres in fee as a compromise "that would have protected the trail." App. at 84. Mr. King further admitted that as few as *10.95* acres would have been acceptable "as protection for the trial [sic]." App. at 88.

The statute as a whole requires the Secretary to attempt to minimize adverse impact upon landowners. *See* 16 U.S.C. § 1246(a)(2). Here, the government made no

attempt to minimize the impact upon the Nelsons' property. In fact, by seeking more land at the condemnation proceeding than during negotiations, it punished the Nelsons for not agreeing voluntarily to sell the land to the government.

Although the Court of Appeals suggested in its Opinion that the Secretary cannot be held to what his agent has stated, App. at 24, it is inconceivable that Donald King, the prime decision-maker, and the government's *only witness*, cannot bind the Secretary to a prior determination of what acreage and interest is necessary. The Court of Appeals also fails to suggest what other evidence the District Court could have relied upon if not the sworn testimony of the person in charge.

The Nelsons do not contend that the Secretary of the Interior must appear and provide evidence that he made a case-by-case determination for each tract of land to be acquired for the Appalachian Trail. In fact, from the outset, the government has held out Mr. King as the person authorized to make these decisions and the Nelsons have accepted that determination. Mr. King was involved in negotiating for the government and was the person "in charge of the National Parks [sic] Service Land Acquisition Program for the Appalachian Trail." App. at 69. Not once did the government indicate that Donald King had no authority to determine what acreage and what interests in land were to be condemned for the Appalachian Trail.

It must be pointed out that, if during the evidentiary hearing, the Secretary, or anyone working on his behalf, had stated that 16.03 acres of land in fee was reasonably

necessary, the Nelsons would have no basis for contesting the Secretary's choice to condemn 16.03 acres in fee. However, the District Court is able only to consider such evidence as is admitted before it, a bare assertion in a pleading is not sufficient. *See, Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.9 (1981); *see also* Fed. R. Evid. 201 (court cannot judicially notice disputed facts unless independently verifiable); *Brown v. Piper*, 91 U.S. 37, 43 (1875). Once the government admits that it does not require the full amount sought in condemnation, the government must be limited to such lesser amount and interest, and the Secretary, on behalf of the government, has gone beyond his statutory authority and has abused his discretion in seeking to condemn more private land than is needed. 16 U.S.C. § 1246(g).

CONCLUSION

When the government attempts to take more title than is reasonably necessary to protect the purposes of the Trail, it acts beyond the scope of its authority. Further, when it seeks to condemn more land than it had previously sought to obtain through negotiations, it clearly acts arbitrarily and capriciously.

For these reasons, Petitioners, Walter and Mary Nelson, respectfully pray that this Court issue a Writ of Certiorari. Important private property ownership rights and the invalidity of the government's condemnation of more title than it needs are at stake. This Court cannot allow the government to trample on private persons'

property rights and take their land when the government admits it does not need to do so.

DATED October 10, 1994.

Respectfully submitted,

PETER W. HALL, ESQ.
Counsel of Record
SHANNON A. BERTRAND, ESQ.
On the Brief
ABELL, KENLAN, SCHWIEBERT
& HALL, P.C.
71 Allen Street
P.O. Box 578
Rutland, VT 05702-0578
(802) 773-3300

Attorneys for Petitioners
Walter and Mary Nelson

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1318 August Term, 1993

(Argued March 8, 1994 Decided: June 14, 1994)

Docket No. 92-6201

UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR,

Plaintiff-Appellant,

- v. -

16.03 ACRES OF LAND, MORE OR LESS, LOCATED IN RUTLAND COUNTY, VERMONT; WALTER B. NELSON; MARY E. NELSON, HUSBAND AND WIFE; TREASURER TOWN OF SHREWSBURY, VERMONT AND UNKNOWN OTHERS,

Defendants-Appellees.

Before: WALKER and JACOBS, *Circuit Judges,* and CARMAN, *Judge.**

Appeal from a judgment of the United States District Court for the District of Vermont (Franklin S. Billings, Jr., *Judge*) limiting to 6.7 acres the amount of defendants-appellees' land that plaintiff-appellant could condemn.

Reversed and remanded.

JACQUES B. GELIN (Robert L. Klarquist on the brief), U.S. Department of Justice (Lois J. Schiffer,

---

* Honorable Gregory W. Carman, of the United States Court of International Trade, sitting by designation.

Acting Assistant Attorney General, Charles R. Tetzlaff, U.S. Attorney, Christopher B. Baril, Assistant U.S. Attorney, James B. Snow, Eric C. Olson and Michael M. Tiernan, of counsel), for plaintiff-appellant.

PETER W. HALL (Shannon A. Bertrand on the brief), for defendants-appellees Walter B. and Mary E. Nelson.

CARMAN, JUDGE:

I. BACKGROUND

A. *The National Trails System Act and Amendments*

This appeal arises from a condemnation proceeding initiated by the Secretary of the Interior (Secretary) for the purpose of acquiring 16.03 acres of land in the Town of Shrewsbury, Vermont for the Appalachian National Scenic Trail (Appalachian Trail). The Appalachian Trail is one of several national scenic trails that Congress created under the National Trails System Act (Trails Act). *See generally* National Trails System Act, Pub. L. No. 90-543, 1968 U.S.C.C.A.N. (82 Stat.) 919 (codified as amended 16 U.S.C. §§ 1241-1251). "The Appalachian Trail is a footpath for use by hikers which extends from Mount Katahdin in Maine to Springer Mountain in Georgia. The trail runs through 14 states and extends approximately 2,100 miles." *United States v. 13.10 Acres of Land*, 737 F.Supp. 212, 213 n.1 (S.D.N.Y. 1990).

In promulgating the Trails Act, Congress charged the Secretary with the primary responsibility of administering the Appalachian Trail. 16 U.S.C. § 1244(a)(1). Consistent with this authority, the Secretary may, among other

things, purchase land from private landowners, exchange federally-held lands for privately-held lands, and acquire privately-held lands through condemnation proceedings. *See* 16 U.S.C. § 1246(e)-(g) (1988).

In 1978, Congress amended the Trails Act in order to "provide additional authority and direction to the Secretary of the Interior to insure the protection of the Appalachian Trail." S. REP. NO. 636, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 456, 457; *see generally* Trails Act Amendments, Pub. L. No. 95-248, 92 Stat. 159. The Senate Report accompanying the amendments identifies the various concerns which prompted the legislation:

> Over 650 miles of the Trail remain in private hands and changes in ownership and increasing pressures for development pose threats to the continuity of the Trail in numerous places. Approximately 180 additional miles of the Trail are now located along roads, providing no real hiking experience, but only a link between disconnected segments of the Trail. Some of these miles of road designation are the result of the Trail having been forced off a parcel of land due to a change in use or ownership.
>
> The Department of the Interior has recognized this increasing threat to the Trail, and is preparing a detailed acquisition plan to carry out the mandate of the 1968 act to protect the Trail. Experience with the Trail has demonstrated, however, that additional authority is needed to insure the acquisition of a corridor sufficient to protect trail values. Similarly, an increase in the funding authorized for the Trail will be necessary to purchase a sufficient route through the areas which are now unprotected.

S. REP. NO. 636 at 3-4, *reprinted in* 1978 U.S.C.C.A.N. at 457-58. Among other things, the 1978 amendments (1) increased the amount of land the Secretary could condemn from an average of 25 acres per mile to the current 125 acres per mile and (2) expanded the budget available for land acquisitions from a total of $5,000,000 to $30,000,000 for each of the fiscal years 1979 through 1981. Trails Act Amendments, Pub. L. No. 95-248, §§ 4, 5(a)(1), 92 Stat. 160 (codified as amended at 16 U.S.C. §§ 1246(g), 1249(a)(1)).

B. *District Court Proceedings*

On September 7, 1990, the government filed its Complaint in Condemnation (Complaint) and Notice in Condemnation (Notice) in the United States District Court for the District of Vermont. As is material to this appeal, the Complaint and Notice contained the following: (1) the coordinates of the parcel of land consisting of "16.03 acres, more or less" the government sought to acquire in fee simple; (2) a description of ownership identifying appellee Walter B. Nelson "*et ux*" as the owners of the parcel; and (3) a summary of the public purposes prompting the condemnation, including the "proper administration, preservation, and development of the Appalachian National Scenic Trail. . . . "

On February 21, 1991, appellees filed an Amended Answer in response to the government's Complaint and Notice. The essence of appellees' Amended Answer was that the government wrongfully sought to condemn 4.46 of the proposed 16.03 acres in fee instead of acquiring an

easement for the 4.46 acres. Appellees claimed negotiations with the government contemplated "a taking in fee of 11.57 acres and a taking by way of easement of 4.46 acres" and the government's compensation award for the taking reflected these amounts. Appellees argued the government decided to condemn all 16.03 acres in fee only after appellees refused to accept the government's compensation award. According to appellees, the award improperly excluded compensatory and severance damages for which the government had promised it would account in making the award. Appellees asserted the government's decision to condemn all 16.03 acres in fee was "vindictive, arbitrary and capricious" and resulted from the government's bad faith actions. In sum, appellees maintained the government's acquisition of 4.46 of the proposed 16.03 acres in fee instead of by easement was an invalid taking under the Fifth Amendment, was unnecessary to comply with 16 U.S.C. § 1246(g), and exceeded the amount of land that was " 'reasonably necessary to provide passage across' [appellees'] lands." Consequently, appellees sought an order from the district court to (1) dismiss the government's Complaint or amend the Complaint and Notice to include a smaller parcel suggested by appellees; (2) amend the Complaint and Notice so as to limit the condemnation to "such acreage as will comprise that width of corridor reasonably necessary to provide passage across [appellees'] lands which will protect the integrity of the trail"; (3) amend the Complaint and Notice so that the government would acquire 11.57 acres in fee and 4.46 acres by an easement.

After conducting a one-day trial, the district court found the government failed to demonstrate "by a preponderance of the evidence that it [was] reasonably necessary" to condemn the 16.03 acres the government sought. *United States v. 16.03 Acres of Land*, No. 90-251, slip op. at 4 (D. Vt. March 12, 1992). The court indicated the government could take "only the minimal interest in land that will accommodate the protection of the trail and passage across lands, having in mind a minimum impact on the landowner by the taking." *Id.* The court found the 16.03 acres were "not necessary to protect the passage of the trail" and concluded the evidence presented and concessions by defendants demonstrated the condemnation of 6.7 acres was "reasonably necessary." *Id.* at 5.

II. Contentions of the Parties

On appeal, the government raises several arguments. First, the government argues the Secretary's decision as to the amount of land to condemn for the Appalachian Trail is not judicially reviewable because such a decision is committed to the Secretary's discretion by law. According to the government, the only matter subject to review was whether the amount of land that the Secretary sought to condemn exceeded the statutory limit of an average of 125 acres per mile. Second, assuming the Secretary's decision is subject to judicial review, the government maintains the district court failed to accord the Secretary the deference mandated by applicable statutory and case law. Moreover, the government contends the district court improperly placed the burden of proving the Secretary did not abuse his discretion on the Secretary. In addition,

the government asserts the district court had no factual basis for concluding the Secretary abused its discretion.

Appellees oppose the government's position on three grounds. First, appellees contend the government waived any objection to the reviewability of the Secretary's decision when it failed to raise the issue before the district court. Second, appellees claim the district court properly concluded the Secretary's decision to condemn 16.03 acres was arbitrary and capricious because the government's own witness conceded a lesser quantity of land and a lesser fee would have satisfied the applicable statutory standards. Finally, as the district court based its conclusion on testimony provided by the government's own witness, appellees argue the court did not substitute its own judgment for that of the Secretary.

III. Discussion

A. *Judicial Review*

Appellees first suggest the government waived its claim that the Secretary's decision to condemn appellees' property was unreviewable. As indicated above, the government bases this claim on the premise that the Secretary's decision was one "committed to agency discretion by law." We note, however, the government consented to the fact-finding proceedings in the district court without first raising its argument that the Secretary's decision was not subject to judicial review. Indeed, the first mention of it appeared in the government's post-trial brief. Regardless of when the government raised the matter, because a question pertaining to the scope of judicial review is a significant and purely legal issue, we will address the

government's contention that the Secretary's condemnation decision pursuant to 16 U.S.C. § 1246(g) is unreviewable. *See Austin v. Healy*, 5 F.3d 598, 601 (2d Cir. 1993) (noting the court's "considerable discretion to decide questions not raised initially in the district court") (citation omitted).

We turn next to the substantive question of whether the Secretary's condemnation decision pursuant to 16 U.S.C. § 1246(g) is subject to judicial review. The resolution of this question necessitates two distinct inquiries. First, we must determine whether the courts have the authority to review the Secretary's condemnation decision. Second, assuming such authority exists, we must then define the standard of review that applies to the decision. We consider each of these questions in turn.

1. Authority for Judicial Review

Our review of the case law from this circuit and our sister circuits indicates no appellate court has considered whether the courts have the authority to review condemnation decisions pursuant to 16 U.S.C. § 1246(g). With respect to the district courts, only one unpublished opinion appears to have reached the issue. *See United States v. 4.70 Acres of Land*, No. 88-1876 (M.D. Pa. April 19, 1989), *construed in United States v. 1867 Acres*, 793 F. Supp. 582, 587 (M.D. Pa. 1992) (noting § 1246(g) allows only a "very narrow scope of review" and indicating the section precludes "defenses challenging the extent of the estate 'taken' " in a § 1246(g) condemnation); *but see United States v. 13.10 Acres of Land*, 737 F. Supp. 212, 218 (S.D.N.Y. 1990) (assuming without deciding that a taking

pursuant to § 1246(g) is subject to judicial review for the purpose of determining whether the Secretary acted arbitrarily or capriciously).

Our resolution of the issue begins with the fundamental principle that "[w]hen Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark v. Wickard*, 321 U.S. 288, 309 (1944). It is equally well-established that "there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." *Garfield v. United States*, 211 U.S. 249, 262 (1908). Consequently, "[t]he courts, when a case or controversy arises, can always 'ascertain whether the will of Congress has been obeyed,' *Yakus v. United States*, 321 U.S. 414, 425 (1944), and can enforce adherence to statutory standards." *INS v. Chada*, 462 U.S. 919, 953 n.16 (1983) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)) (other citations omitted). Judicial review of the exercise of congressionally-delegated authority exists in recognition of the fact that "a delegation of power implies some limit [and a]ction beyond that limit is not legitimate." LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

Several courts have recognized these limitations in connection with an agency's ability to exercise congressionally-delegated eminent domain powers. In reviewing challenges to the exercise of these powers, some courts

have tailored their analysis to considering whether government officials acted within their statutory limits. *See Catlin v. United States*, 324 U.S. 229, 240 (1945) (indicating a landowner whose property is the subject of a taking may "challenge the validity of the taking for departure from the statutory limits"); *Maiatico v. United States*, 302 F.2d 880, 886 (D.C. Cir. 1962) (holding the General Services Administration condemned property outside the statutorily-designated "taking area" and, therefore, acted without authority). Other decisions have analyzed disputed condemnations in terms of whether the government officials effecting the condemnation acted arbitrarily, capriciously, or in bad faith. *See United States v. Carmack*, 329 U.S. 230, 243 (1946) (noting a reviewing court may set aside a decision to condemn a parcel of property "as unauthorized by Congress if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned") (footnote omitted); *United States v. 1.33 Acres*, 9 F.3d 70, 73 (9th Cir. 1993) (considering whether the condemnation decision at issue was "arbitrary, capricious, or" made in bad faith). Regardless of the terminology employed by the reviewing courts in the foregoing cases, they clearly indicate condemnation decisions are subject to judicial review. We hold, therefore, that condemnation decisions by governmental entities to which Congress has delegated eminent domain authority are subject to judicial review.

2. Standard of Review

Although case law preponderates in favor of subjecting condemnation decisions to judicial review, the precise standard of review that the courts should apply to such decisions is unclear. As suggested by the court's previous discussion, the cases in which the courts have reviewed condemnation decisions generally employ one of two standards of review. The first standard, which may be described as an "ultra vires" standard,[1] requires the reviewing court to examine the challenged taking for the purpose of determining whether the officials effecting the taking acted outside the scope of their taking authority. *See Catlin*, 324 U.S. at 240; *Maiatico*, 302 F.2d at 886. Other cases use an "arbitrary, capricious, or bad faith" standard of review to assess the validity of a contested taking. *See Carmack*, 329 U.S. at 243-48; *1.33 Acres*, 9 F.3d at 73; *United States v. 101.88 Acres of Land*, 616 F.2d 762, 767 (5th Cir. 1980). Still others appear to apply both the "ultra vires" standard and the "arbitrary, capricious, or bad faith" standard. *See United States v. 58.16 Acres of Land*, 478 F.2d

---

[1] The courts generally apply the term "ultra vires" to any action taken without authority. *See, e.g., U.S. East Telecommunications, Inc. v. U.S. West Info. Sys., Inc.*, 15 F.3d 261, 263 (2d Cir. 1994) (describing as *ultra vires* the issuance of an amended scheduling order by the district court); *DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163, 1165-66 (7th Cir. 1994) (characterizing as *ultra vires* an attempt by a magistrate judge to arbitrate the parties' dispute); *Moller-Butcher v. United States Dep't of Commerce*, 12 F.3d 249, 252 (D.C. Cir. 1994) (noting the Under Secretary of Commerce had the authority to review a decision of an administrative law judge (ALJ) and therefore did not act *ultra vires* in restoring the ALJ's decision).

1055, 1059 (7th Cir. 1973); *United States v. 2606.84 Acres of Land*, 432 F.2d 1286, 1290 (5th Cir. 1970), *cert. denied*, 402 U.S. 916 (1971); *United States v. 2.9 Acres of Land*, 554 F. Supp. 529, 531 (D. Mont. 1982).

These two standards, however, are clearly distinct. On the one hand, the "ultra vires" standard requires the reviewing court to ascertain the scope of the acting officials' statutory authority and determine whether the officials' action conformed with their authority. Such authority may be broad or narrow depending upon the language employed in the empowering legislation. Similar to the role the court's play in interpreting contracts, the courts' role in applying the "ultra vires" standard is limited to examining the four corners of the statute that gives the officials the power to act and determining whether the officials have complied with the statute's language. On the other hand, the "arbitrary, capricious, or bad faith" standard necessitates an analysis of *the manner* in which the officials exercised their authority.

Despite the fact that the "ultra vires" and "arbitrary, capricious, or bad faith" standards are dissimilar. some courts have merged the divergent inquiries each requires. *See, e.g., Carmack*, 329 U.S. at 243 ("In this case, it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned.") (footnote omitted); *58.16 Acres of Land*, 478 F.2d at 1058-59 (concluding the district court erred by not considering whether officials acted arbitrarily, capriciously, or in bad faith to decide whether taking was for

authorized purpose); *2606.84 Acres of Land*, 432 F.2d at 1290 (examining whether officials acted arbitrarily, capriciously, or in bad faith in order to determine whether taking conformed with statutory purpose); *2.9 Acres of Land*, 554 F. Supp. at 531 (considering whether officials acted arbitrarily, capriciously, or in bad faith to determine whether they exceeded the limits of their condemnation authority). The reasoning underlying these cases appears to proceed on the premise that officials charged with eminent domain powers act outside the scope of their statutory authority when they undertake a condemnation in bad faith, or in an arbitrary or capricious manner.

Such a premise, however, is questionable because it blurs the distinctions noted previously with respect to the "ultra vires" and "arbitrary, capricious, or bad faith" standards of review. While we do not condone arbitrary, capricious, or bad faith conduct, the mere fact that delegated officials exercise their statutory condemnation power arbitrarily, capriciously, or in bad faith does not necessarily establish they have exceeded their authority. To equate arbitrary, capricious, or bad faith conduct with actions that lack legal authority improperly consolidates two distinct inquiries into one and obfuscates the courts' proper role in reviewing actions taken pursuant to congressionally-delegated authority to condemn property. *Cf.* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 265-66 (analyzing the courts' use of the "abuse of discretion" standard and noting that rationalizing "each and every 'abuse of discretion' in terms of lack of statutory authority no doubt makes for systematic simplicity, . . . [b]ut it adds little of substance"). Because we believe the ultimate question the courts must decide in reviewing such action

in the eminent domain context is whether the delegated officials acted in conformity with their legislative grant of authority, we conclude the courts should apply the "ultra vires" standard of review.

Nevertheless, a determination that the Secretary acted in accordance with his statutory authority does not end the reviewing court's inquiry. Even after the court concludes the Secretary conformed to his legislative grant of authority, the court may still consider the manner in which he exercised that authority. Such a consideration requires the reviewing court to determine whether the Secretary acted arbitrarily, capriciously, or in bad faith. The purpose of such an inquiry, however, is not to determine whether the Secretary conformed to his statutory authority, but rather whether he *abused* his authority. The distinction noted is analogous to the difference appearing in the inquiries required in cases reviewing administrative action falling under the Administrative Procedure Act (APA).[2] *Compare* 5 U.S.C. § 706(2)(C) (1988) (requiring the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right") *and* 5 U.S.C. § 706(2)(A) (1988) (requiring the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

---

[2] We do not suggest the Administrative Procedure Act applies in the takings context.

Similar to the review required under 5 U.S.C. § 706(2)(A) in the APA context, the courts' role in reviewing the Secretary's action for arbitrariness, caprice, or bad faith is limited. The courts may only ascertain whether the Secretary based his decision on a consideration of the relevant statutory factors and may not substitute their own judgment for that of the Secretary. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Under this standard, a reviewing court may only set aside a takings decision as being arbitrary, capricious, or undertaken in bad faith in those instances where the court finds the Secretary's conduct so egregious that the taking at issue can serve no public use. *See 101.88 Acres of Land*, 616 F.2d 762, 767 (indicating the determination as to whether a taking has occurred for a public use may depend upon whether "authorized officials were acting in bad faith or arbitrarily or capriciously by condemning given land").

In this case, the boundaries limiting the Secretary's condemnation authority clearly appear in 16 U.S.C. § 1246(g). This statute reads as follows:

> The Appropriate Secretary may utilize condemnation proceedings without the consent of the owner to acquire private lands or interests therein pursuant to this section only in cases where, in his judgment, all reasonable efforts to acquire such lands or interests therein by negotiation have failed, and in such cases he shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands: *Provided*, That condemnation proceedings may not be utilized to acquire fee title

> or lesser interests to more than an average of one hundred and twenty-five acres per mile.

§ 1246(g) (emphasis in original). The restrictions created by the foregoing language provide a basis for measuring the Secretary's actions for conformity to his legislative grant.

The first restriction created by § 1246(g) is that the Secretary must enter into land acquisition negotiations before exercising his eminent domain powers. The inclusion of the term "only" following the grant of condemnation authority effectively makes land acquisition negotiations a condition precedent to the exercise of that authority. *See* S. REP. NO. 636 at 5, *reprinted in* 1978 U.S.C.C.A.N. at 459 ("[T]he expectation of the committee is that eminent domain will continue to be used as a tool of last resort for the Trail" after land acquisition negotiations have failed.). The Secretary is simply not free to invoke his eminent domain authority without first attempting to purchase the land in question. The fact that the statute gives the Secretary discretion in deciding when "all reasonable efforts to acquire . . . lands or interests therein by negotiation have failed" does not alter the statute's mandate that the Secretary enter into land acquisition negotiations *before* exercising his eminent domain powers. Nevertheless, the negotiation requirement is itself limited to the extent that Congress has expressly vested the Secretary with the discretion to determine when negotiations are fruitless. Despite this discretion, a court could properly conclude the Secretary acted without authority if the evidence presented demonstrated the Secretary either never attempted to negotiate with a landowner or negotiated in such bad faith that he

effectively failed to satisfy the negotiation condition before condemning the property.

The second restriction in § 1246(g) limits the amount of title the Secretary may acquire through condemnation. Specifically, the statute only permits the Secretary to "acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands." In his context, as with the negotiation requirement, the use of the term "only" in connection with the title the Secretary may acquire denotes a limitation. While this limitation is more ambiguous than the negotiation requirement, it nevertheless suggests the Secretary must make a reasoned determination as to the title that is "necessary to provide passage." The fact that the statute gives the Secretary discretion does not negate the separate requirement that the Secretary make a reasoned determination as to the amount of title he needs to acquire. Nevertheless, as noted in connection with the negotiation requirement, the Secretary's discretion does not preclude the courts from considering whether the Secretary acted within the scope of his authority. A conclusion that the Secretary acted outside the scope of his authority, however, requires proof that he either failed to make any determination as to the amount of title that is "necessary to provide passage" or made a determination in such bad faith that he effectively failed to satisfy the "determination" requirement before condemning the property.

The third restriction contained in § 1246(g) limits the amount of land that the Secretary may condemn to "an average of [125] acres per mile." As explained in the legislative history of the Trails Act, "[w]hile the language

of the act enables the Secretary to average the land acquisitions within each mile of the trail, it explicitly precludes him from averaging out the acquisition of lands over extended sections of the trail." H. REP. NO. 1631, 90th Cong., 2d Sess. ___ (1968), *reprinted in* 1968 U.S.C.C.A.N. 3855, 3858. The foregoing passage reveals a calculated decision by Congress to curtail the Secretary's taking authority with respect to the amount of land he may condemn. Despite this proscription, however, nothing in the statute prohibits the Secretary from condemning *up to* "an average of [125] acres per mile." Consequently, this limitation provides landowners with a limited remedy. A landowner may rely on this limitation to demonstrate the Secretary has exceeded his authority only to the extent that (1) the condemnation of the landowner's property would cause the total amount of condemned property to surpass the 125 acres per mile average or (2) the Secretary has already surpassed the 125 acres per mile average before condemning the landowner's property. Where a landowner cannot make either of these showings and the Secretary has satisfied the two other restrictions discussed previously, we believe the broad discretion granted to the Secretary for condemning land *up to* "an average of [125] acres per mile" bars the courts from disturbing the Secretary's condemnation on the grounds that he condemned too much property. Having defined the proper standard for reviewing the Secretary's condemnation decisions, we turn next to the district court's decision.

B. *The District Court's Decision*

1. Standard of Review

This court will uphold the district court's findings unless they are clearly erroneous. *Harrison v. Grobe*, 984 F.2d 594, 595-96 (2d Cir. 1993) (citing FED. R. CIV. P. 52(a)). "[A] 'finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed.' " *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (emphasis in original).

2. The Condemnation

The record in this case indicates the district court misconstrued its function in reviewing the Secretary's condemnation. As noted previously, the district court described its reasoning as follows:

> One must attempt to take only the minimal interest in land that will accommodate the protection of the trail and passage across lands, having in mind a minimum impact on the landowner by the taking. It is the burden of the government to show by a preponderance of the evidence that it is reasonably necessary for these purposes to take the land or interest herein.

United States v. 16.03 Acres of Land, No. 90-251, slip op. at 4. After finding the 16.03 acres the Secretary sought were "not necessary to protect the passage of the trail," the court determined the evidence presented and concessions

by defendants demonstrated the condemnation of 6.7 acres was "reasonably necessary." *Id.* at 5. We conclude the district court's findings are clearly erroneous because they depend upon a misapplication of the statutory standards that govern condemnations made pursuant to § 1246(g) and upon evidence that is irrelevant in actions challenging such condemnations.

We turn first to the "minimal interest" standard employed by the district court. We find such a standard imposes limitations on the Secretary's authority that have no basis in statutory or case law. In short, nothing in § 1246(g) or any other provision of the Trails Act suggests, as the district court assumed, the Secretary can only condemn "the minimal interest in land that will accommodate the protection of the trail and passage across lands, having in mind a minimum impact on the landowner by the taking." *See id.* As discussed previously with respect to the amount of title or property the Secretary may condemn, the only limitations on the Secretary's authority are (1) he must enter into land acquisition negotiations before exercising his authority, (2) he must make a reasoned determination as to the title that is "necessary to provide passage," and (3) he cannot condemn more than "an average of [125] acres per mile." *See* § 1246(g). Consequently, so long as the Secretary negotiates with the landowner whose property he wants to acquire, makes a reasoned determination as to the title that is "necessary to provide passage," and does not condemn an amount of property in excess of "an average of [125] acres per mile," he has *no* other limitations. Accordingly, we conclude the premise underlying the district court's decision that the

Secretary is limited to any kind of "minimal interest" is groundless.

We hold the district court's "minimal interest" standard conflicts with the manifest purpose of the Trails Act Amendments of 1978. As noted previously, Congress amended the Trails Act in order to "provide additional authority and direction to the Secretary of the Interior to insure the protection of the Appalachian Trail." S. REP. No. 636 at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 457. To accomplish these goals, the legislature expanded the Secretary's eminent domain authority and increased his budget for land acquisitions. *See* Trails Act Amendments, Pub. L. No. 95-248, §§ 4, 5(a)(1), 92 Stat. 160 (codified as amended at 16 U.S.C. §§ 1246(g), 1249(a)(1)). Contrary to Congress' express interest in augmenting the Secretary's authority, the district court's "minimal interest" standard creates a new impediment on the Secretary's ability to protect the trail by limiting the amount of land he may take. In short, because the amendments sought to bolster the Secretary's condemnation authority under the Act and worked in tandem with the Secretary's well-defined discretion in implementing the Act, we find no basis for applying the "minimal interest" standard that the district court adopted.

In addition, we find the court improperly modified the statutorily-prescribed criteria set forth in § 1246(g) by making the impact that a condemnation might have on a property owner another factor that the Secretary must consider. While we do not suggest the Secretary should ignore the impact of his condemnation decisions, nothing in the text of the Trails Act, the Trails Act Amendments, or the statutes' legislative history indicates Congress

intended to make this kind of impact a factor that must guide the Secretary's decisions. Consequently, we find the district court erred in considering this factor in reviewing the Secretary's decision.

We turn next to the evidence upon which the district court's opinion relies. This evidence consisted of the testimony of appellee Walter B. Nelson and the testimony of the government's realty officer in charge of land acquisitions for the Appalachian Trail. Specifically, the district court relied upon Mr. Nelson's concession that seven acres were "reasonably necessary" for the government's condemnation and the government witness' testimony that the government would have accepted 10.95 acres in fee from appellees. *See 16.03 Acres of Land*, No. 90-251, slip op. at 2-3, 5; Tr. at 39-40, 69.

We believe such evidence provides an inadequate basis for concluding the Secretary could only condemn 6.7 acres of the 16.03 acres he originally sought. In short, we find Mr. Nelson's testimony concerning the amount of property that he conceded was "reasonably necessary" to be simply irrelevant. The plain language of § 1246(g) precludes consideration of such testimony because it places the determination of the amount of property that is "reasonably necessary" in the province of the Secretary alone. Relying on what a landowner perceives to be "reasonably necessary" improperly deflects the statute's focus away from the Secretary and onto the landowner. While a landowner's testimony may be relevant for the purpose of determining whether the Secretary ran afoul of § 1246(g)'s limitations, the district court did not use the testimony for this purpose. Instead, the court substituted Mr. Nelson's concession as to the amount of property that

is "reasonably necessary" to satisfy the statutory purpose for the Secretary's determination on this question. Contrary to appellees' position, the fact that the amount of property the district court ultimately decided was "reasonably necessary" differed from Mr. Nelson's concession by only three-tenths of an acre and was four and one-quarter acres less than the amount suggested by the government's witness clearly shows the district court relied on Mr. Nelson's testimony. As Congress has unequivocally given the Secretary the discretion to decide how much property he needs to condemn to satisfy the statutory purpose and Mr. Nelson's concession does not tend to show the Secretary exceeded his statutory authority, we can discern no basis for giving any weight to Mr. Nelson's testimony in this case.

The district court's reliance on the government's witness' testimony was also improper. In essence, the mere fact that a government witness testifies the government would have accepted a parcel of land that is smaller than the parcel the government seeks in its complaint in condemnation does not demonstrate the government is *not* entitled to the amount identified in its complaint. As noted above, the Secretary must enter into land acquisition negotiations *before* exercising his eminent domain powers. It is only after the Secretary determines such negotiations are futile that he can invoke his condemnation authority. Where, as here, negotiations prove futile, the Secretary is then free to condemn the amount of title and property he deems "reasonably necessary" to fulfill the statutory purpose. The ultimate decision as to the amount of title and property clearly does not occur in a vacuum. Common sense dictates the decision will depend

upon the needs the Secretary perceives, the realities revealed in his negotiations with the landowners, and the applicable statutory guidelines. As a result, we believe it is improper to use the testimony of a single government witness as to what that witness believes is "reasonably necessary" as a barometer of what the Secretary believes is "reasonably necessary." Although such testimony may reflect the belief of the witness, it does not follow that a reviewing court may seize upon it as the actual position of the Secretary with respect to a challenged condemnation and disregard the Secretary's position as it appears in his complaint in condemnation.

In sum, the errors committed by the district court with respect to the legal standard applicable to the Secretary's condemnation decisions and the evidence upon which the court relied compel us to conclude the court's findings are manifestly erroneous. Moreover, because nothing on the record suggests the Secretary violated the statutory guidelines contained in § 1246(g), we hold his decision to condemn 16.03 acres in fee was proper. A remand is necessary in this case, however, for the sole purpose of determining the fair and just compensation to which appellees are entitled for the taking of the 16.03 acres in fee.

IV. Conclusion

The district court's judgment in favor of appellees is reversed and the case is remanded to allow the district court to determine the amount of compensation the government must pay to acquire the 16.03 acres in question.

UNITED STATES DISTRICT COURT
DISTRICT OF
Vermont

United States of America

v.

16.03 Acres of Land, More or Less, Located in Rutland County, VT; Walter B. Nelson and Mary E. Nelson, Husband and Wife; Treasurer, Town of Shrewsbury, VT; Unknown Owners

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 90-251

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED The fair market value of the 6.7 acres of land located in the Town of Shrewsbury and owned by Walter and Mary Nelson is $23,450.00, and Walter and Mary Nelson are entitled to recover from the plaintiff $23,450.00 damages.

Post judgment interest rate effective this date is 4.26%.

June 10, 1992
Date

RICHARD PAUL WASKO
Clerk

/s/ Anne M Nealley
(By) Deputy Clerk

JUDGMENT ENTERED ON DOCKET
DATE: June 16,1992

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13 day of July one thousand nine hundred and ninety-four.

Present: Hon. John M. Walker,

Hon. Dennis G. Jacobs, C.JJ.

Hon. Gregory W. Carman, USICT*

CIRCUIT JUDGES,

UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR,

Plaintiff-Appellant,

v.

16.03 ACRES OF LAND, MORE OR LESS, LOCATED IN RUTLAND COUNTY, VERMONT; WALTER B. NELSON; MARY E. NELSON, HUSBAND AAND [sic] WIFE; TREASURER TOWN OF SHREWSBURY, VERMONT AND UNKNOWN OTHER,

Defandants [sic]-Appellees.

Docket No. 92-6201

(Filed July 13, 1994)

A petition for rehearing having been filed herein by **Appellees 16.03 ACRES OF LAND, et.al.**

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

SO ORDERED:
FOR THE COURT
George Lange III, Clerk
By: /s/ Kathy Brouwer
Kathy Brouwer,
Operations Mgr.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of June, one thousand nine hundred and ninety-four.

Present: HON. JOHN M. WALKER,
HON. DENNIS G. JACOBS,
Circuit Judges.
HON. GREGORY W. CARMAN,
Judge.*

UNITED STATES OF AMERICA,
DEPARTMENT OF INTERIOR,

Plaintiff-Appellant,

v.

16.03 ACRES OF LAND, MORE OR LESS, LOCATED IN RUTLAND COUNTY, VERMONT; WALTER B. NELSON; MARY E. NELSON, HUSBAND AND WIFE; TREASURER TOWN OF SHREWSBURY, VERMONT AND UNKNOWN OTHERS,

Defendants-Appellees.

Docket No.
92-6201

(Filed
June 14, 1994)

Appeal from the United States District Court for the District of Vermont.

---

*Honorable Gregory W. Carman, of the United States Court of International Trade, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is **reversed** and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this Court.

George Lange III, Clerk
By: /s/ Edward J. Guardaro
Edward J. Guardaro,
Staff Attorney

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
v.	:	Civil Action No. 90-251
16.03 ACRES OF LAND; WALTER B. NELSON and MARY E. NELSON, et al	:	(Filed Mar. 12, 1992)

FINDINGS OF FACT, OPINION AND ORDER

Hearing was held on February 19, 1992, relative to the reasonable necessity of condemning 16.03 acres of land located in Shrewsbury, Vermont, by the National Park Service for the Appalachian Scenic Trail. Upon consideration of the oral evidence, stipulations of the parties, and exhibits, the court finds as follows:

A plan for the Appalachian Scenic Trail was approved in 1983, and updated in 1986 (government's exhibit 1). Prior to that time, one of the high priority tracts to be acquired was a tract of land consisting of 34.38 acres located in the northern part of the land owned by Walter and Mary Nelson of Shrewsbury, Vermont. However, when the plan was finally promulgated, the government abandoned this piece of land and instead indicated that a tract on the southern portion of the Nelson property, consisting of 16.03 acres, was to be acquired in order to provide reasonable passage and to protect the trail. Prior to the actual filing of the Notice in Condemnation, on August 7, 1990, the government, through the Acting Chief Land Acquisition Field Office, and under date of May 13, 1988, indicated that a parcel of

land consisting of 11.57 acres, more or less, and an easement on a tract of land containing 4.46 acres, more or less, was reasonably necessary to be acquired for the purpose of the trail. Although the government failed to introduce any evidence that this entire acreage, to wit, 16.03 acres, was reasonably necessary, the Acting Land Acquisition Officer conceded at trial that a parcel of land of 10.95 acres, more or less, whether in fee or by easement, would provide reasonable protection to the trail, and reasonable passage.

There are no general standards for the corridor width, although the width normally is between 400 and 1,000 feet. The present trail in this area is located along the southerly fence line of the Nelson property, all in wooded terrain, and the trail does encounter a small wet spot, five to six feet in length, as it emerges on Keiffer Road where the present corridor is 200 feet in width. This wet spot is easily transversed, in that rocks have been placed in the area. The government desires here a corridor of trees to protect the trail, and this corridor of trees presently exists to a depth of 100 to 150 feet. The government seeks views to the mountains, which views now exist from the Keiffer Road, and on parcel 213-15, being the former Pratt property.

The Nelsons concede that it is reasonably necessary for the government to acquire a parcel of 6.7 acres of land in this area, thereby giving a total corridor width of 400 feet on the east side of Keiffer Road, (defendants exhibits C and M). With the acquisition of this parcel, the trail and passageway would reasonably be protected, and with this additional 200 feet frontage on Keiffer Road, the relocated

trail would avoid the wet area, and the trail could proceed directly west across Keiffer Road to the Pratt property.

DISCUSSON

Pursuant to 16 U.S.C. § 1246(g), the Secretary of the Interior, or his designee, has the authority to utilize condemnation proceedings without consent of the owner to acquire private lands or interest therein in furtherance of the plans of the National Appalachian Scenic Trail, provided that reasonable efforts to acquire such lands or interest by negotiation have failed. Further, a relevant portion of § 1246(g) provides that the Secretary "shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands . . . " In *United States v. 13.9 Acres, More or Less* (*Meyerhoff*), Civil File No. 87-124 (D.Vt. August 7, 1989; April 27, 1990), Judge Coffrin stated that the government's authority to condemn land was limited to the applicable sections of Title 16. Consequently, the government does not have unrestricted authority to take whatever lands and interest it wishes, but must tailor its acquisition to that which is reasonably necessary to provide passage across the lands.

The corollary of this statement in *Meyerhoff* is that this Court may examine any agency decision to insure that its acquisition proposal is reasonable necessary. As Judge Coffrin noted: "[J]udicial deference [to an agency's determination] must not become a medium for judicial acquiescence in the agency's transgression of the limits Congress has set upon it." Slip op. at 21 n.4 (August 7, 1989), *quoting National Wildlife Fed'n v. Interstate Commerce*

Comm'n, 850 F.2d 694, 699 n.6 (D.C. Cir. 1988). One must attempt to take only the minimal interest in land that will accommodate the protection of the trail and passage across lands, having in mind a minimum impact on the landowner by the taking. It is the burden of the government to show by a preponderance of the evidence that it is reasonably necessary for these purposes to take the land or interest therein.

Upon the facts in this case, the government has failed in its burden to show the necessity of taking 16.03 acres of land in fee, particularly in view of the fact that the government has continuously throughout this entire proceeding changed the number of acres which the government seeks to acquire. The government admits, through its duly authorized agent, that it has not analyzed or even considered if a taking should be in fee or by easement. The fact is that at some time during this condemnation process, an agent of the National Park Service bureaucracy, situated in his office in West Virginia, made an arbitrary decision as to what amount of land should be condemned.

IT IS HEREBY ORDERED AND ADJUDGED that the condemnation of 16.03 acres of land, be the same more or less, is not necessary to protect the passage of the trail.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that by virtue of the evidence and the concession of defendants, that the condemnation of 6.7 acres of land in fee, as shown in defendant's exhibits C and M, is reasonably necessary.

Dated at Rutland in the District of Vermont this 12 day of March, 1992.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Civil No. 90-251
16.03 ACRES OF LAND;	:	
WALTER B. NELSON and MARY	:	
E. NELSON, ET AL	:	

ORDER

On October 30, 1991, defendants Walter Nelson and Mary Nelson filed a motion regarding the trial in the above captioned matter of necessity issues and of compensation issues. This motion is hereby GRANTED, and the trial shall be bifurcated such that a determination will first be made on the extent of condemnation reasonably necessary and then a determination will be made of the appropriate compensation.

SO ORDERED.

Dated in Rutland in the District of Vermont this 17 day of November, 1991.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Civil No. 90-251
16.03 ACRES OF LAND:	:	
WALTER B. NELSON and MARY	:	
E. NELSON, ET AL	:	

AMENDED ANSWER AND OBJECTIONS OF DEFENDANTS WALTER B. NELSON AND MARY E. NELSON

Now come defendants Walter B. Nelson and Mary E. Nelson in the above-entitled action as amended, through their attorneys George W.F. Cook, Esq. and Abell, Kenlan, Schwiebert & Hall, P.C., and make an amended answer to, and set forth herein their defenses to, and objections to, the Notice in Condemnation in the above-entitled action, as follows:

DEFENDANTS INTEREST IN PROPOSED TAKING

The defendants Walter B. Nelson and Mary E. Nelson are the owners in fee of the entire tract of 16.03 acres of land proposed to be taken in condemnation by the plaintiff, having been in continuous ownership and possession of said tract for more than nine years.

DEFENDANTS OBJECTIONS AND DEFENSES

1. Of the 16.03 acres proposed to be taken in fee, 4.46 of said acres are being taken in fee instead of by

easement as a result of the bad faith, vindictive, arbitrary and capricious actions of administrative personnel believed to be assigned to the Appalachian National Trail Land Acquisition Office in Martinsburg, West Virginia.

1.A. The defendants expressly allege that officials of the said Land Acquisition Office, on behalf of the Secretary of the Interior, and pursuant to law, 16 U.S.C. Sec. 1246(g) *et seq.*, negotiated the taking now sought from the defendants as a complete taking in fee but originally negotiated as a taking in fee of 11.57 acres and a taking by way of an easement of 4.46 acres (see Defendants' Exhibit A).

1.B. Furthermore, the defendants allege that the Government's award of compensation to the defendants, in accordance with law and administrative procedures, was based on the negotiated taking in fee of 11.57 acres and negotiated taking by way of easement of the remaining 4.46 acres. (See Defendants' Exhibit B).

1.C. Lastly, the defendants allege that in violation of the above-cited Federal Statute and procedures implementing the same, the instant condemnation action seeking now to take all 16.03 acres in fee results from a decision made in bad faith, and made capriciously and arbitrarily by said Martinsburg, West Virginia U.S. Government personnel to punish the defendants for refusing to accept the compensation award letter of August 12, 1988 (Defendants' Exhibit B), which letter excluded severance damages in spite of prior assurances from said same Government personnel that the Government's appraiser would take into account both compensatory and severance damages in establishing the Government's award of

compensation for the 11.57 acres taken in fee and the 4.46 acres taken by easement (See Defendants' Exhibit A).

2. Defendants object to so much of the taking which condemns all 16.03 acres in fee instead of a condemnation of the negotiated and designated 4.46 acres by way of easement, with substantial rights in the defendants, as being a taking in violation of the underlying Statute authorizing the taking of interests in land for the protection of the Appalachian National Trail and administrative procedures implementing the same. (See 16 U.S.C. Sec. 1241 *et seq.* and particularly 16 U.S.C. Sec. 1246(g)).

3. The condemnation of 16.03 acres in fee, as opposed to 11.57 acres in fee and 4.46 acres by way of easement, is a taking in violation of the Fifth Amendment of the Constitution of the United States, said taking being a bad faith decision by United States Government personnel, and in part, a taking which is not for a public purpose but is a taking to punish the defendants for the position that defendants took when attempting to negotiate the fair and just compensation due for the loss of their fee in 11.57 acres and for the loss of the easement to the remaining 4.46 acres.

4. The condemnation of said 4.46 acres in fee, instead of by way of easement, is not necessary to comply with the intent and meaning of the applicable federal statute, but is wholly unnecessary to comply with the same.

5. Further, defendants assert that the entire proposed taking of the 16.03 acres in fee is far more acreage than "is reasonably necessary to provide passage across" the lands of the defendants, and a much lesser taking, as

proposed by the cross-hatched section on the diagram/map attached hereto and incorporated by reference as exhibit C, which taking would give the Government approximately 200 feet of road frontage on Town Highway #5 and be bounded on the southerly sides by Parcel 213-17, formerly lands of Walsh, will provide a width of corridor for the trail where it now exists which is wholly adequate "to protect the integrity of the Trial."

WHEREFORE, the defendants Walter B. Nelson and Mary E. Nelson pray that this Court:

I. Dismiss the complaint or order the plaintiff to amend its complaint and notice to the defendants to comply with the underlying law by condemning only that acreage as comprises the cross-hatched portion appearing on Exhibit C attached to this answer and described in Paragraph 5, above; OR,

II. In the alternative, but only if the court rules that defendants are not entitled to the relief requested in Paragraph I, above, and that the Government is entitled to condemn more land than that proposed in Exhibit C of this answer, then order the plaintiff to amend its complaint and notice to the defendants to comply with the underlying law by condemning only such acreage as will comprise that width of corridor reasonably necessary to provide passage across the defendants' lands which will protect the integrity of the trail; OR,

III. In the alternative, but only if the court finds that the defendants are not entitled to the relief prayed for in Paragraphs I. and II., above, then order the plaintiff to amend its complaint and notice to the defendants to

comply with the underlying law by condemning the 11.57 acres in fee and 4.46 acres by way of easement; AND

IV. Award the defendants their just costs in this action.

REQUEST FOR JURY TRIAL

The defendants ask for a trial by jury if any issue of just compensation to the defendants is reached in this action.

Dated at Rutland, in the District of Vermont, this 20th day of February, 1991.

WALTER B. NELSON and
MARY E. NELSON

By: /s/ George W.F. Cook
GEORGE W.F. COOK,
Their Attorney
70 Litchfield Ave.
Rutland, VT 05701
802-773-7888

ABELL, KENLAN, SCHWIEBERT & HALL, P.C.

By: /s/ Peter W. Hall
Peter W. Hall,
Their Attorney
#00034776
P.O. Box 578
Rutland, VT 05702
802-773-2754

DEFENDANTS' EXHIBIT A

[SEAL]

United States Department of Interior

NATIONAL PARK SERVICE
APPALACHIAN NATIONAL SCENIC TRAIL
LAND ACQUISITION FIELD OFFICE
P.O. BOX 908
MARTINSBURG, WV 25401

IN REPLY REFER TO:
L1425(633)
Re: Tracts 213-08/24

MAY 13 1988

Mr. George W. F. Cook
Attorney at Law
Mead Building
Rutland, Vermont 05701

Dear Mr. Cook:

Thank you for your letter of May 8. Your acreage calculations are correct, as is evidenced by the enclosed legal descriptions for Tracts 213-08 (Fee) and 213-24 (Easement). The appraisal is being ordered promptly, and the appraiser should be in touch with you within the next ten days or so to make arrangements to inspect the property. We have asked the appraiser to try to conduct his inspection of the property prior to May 31, and I expect he will be able to comply with our request. The appraisal will be conducted in accordance with the procedural requirements of the Uniform Appraisal Standards for Federal Land Acquisitions, and the appraiser will take into account any severance damages allocable to the remainder resulting from the acquisition.

I will forward copies of the approved appraisal report to you and to Mr. and Mrs. Nelson as soon as it has been

received and reviewed for technical compliance with the above-referenced Standards. Please contact me directly at (304)-263-4943 if the appraiser has not contacted you by May 20.

Sincerely,

/s/ Donald T. King
Donald T. King
Acting Chief, Land Acquisition Field Office

Enclosures

cc: Mr. and Mrs. Nelson – w/encl.
Mr. Tony Conte – w/o encl.

Tract 213-08

All that certain tract or parcel of land lying and being situated in the Town of Shrewsbury, Rutland County, State of Vermont, and being more particularly described as follows:

BEGINNING at an "X" chiseled in a large flat rock located on the westerly side of Middle Road – TH No. 45, said chiseled "X" being a corner common to lands formerly of John J. Walsh, Jr., et ux, now of the United States of America (Appalachian National Scenic Trail, Tract 213-17) and subject owner; thence, with the property line of said Government Lands, the following seven bearings and distances:

South 45° 54' 24" West, 204.0 feet, along remnants of a wire fence, to a 5/8" rebar in a stone wall;

South 02° 38' 25" East, 189.6 feet, along a stone wall and remnants of a wire fence, to a 5/8" rebar at the end of said stone wall;

South 88° 59' 05" West, 605.7 feet, along remnants of a wire fence, to a 5/8" rebar;

South 66° 56' 40" West, 327.5 feet, along remnants of a wire fence, to a 5/8" rebar;

South 68° 34' 10" West, 213.5 feet, along remnants of a wire fence, to a 5/8" rebar;

South 73° 38' 50" West, 208.8 feet, along remnants of a wire fence, to a 5/8" rebar; and,

South 67° 55' 05" West, 240.7 feet, along remnants of a wire fence, to a 5/8" rebar, being another corner common to said Government Lands and subject owner; thence, severing the lands of subject owner, with the boundary line of Tract 213-24, Appalachian National Scenic Trail, North 53° 49' 31" East, 1,846 feet, more or less, to a point on the westerly side of said Middle Road; thence, with the westerly side of said Middle Road, South 24° 15' 30" East, 430 feet to the point of beginning.

Containing 11.57 acres, more or less.

The above-described parcel, designated as Tract 213-08, Appalachian National Scenic Trail, is a portion of the same land acquired by Walter B. Nelson, et ux, from Louis C. Rosato by deed dated August 3, 1981 and recorded August 7, 1981 in Deed Book 25, Page 387, in the Shrewsbury Town Clerk's Office, Rutland County, State of Vermont.

BEARINGS REFER TO VERMONT STATE PLANE COORDINATE SYSTEM.

FURTHER REFERENCE IS MADE TO PLATS ENTITLED "U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, APPALACHIAN NATIONAL SCENIC TRAIL, SURVEY OF TRACT 213-17", DATED: JULY 11, 1985, BY: DUBOIS & KING, INC., RANDOLPH, VERMONT, SCALE: 1"=200', PROJECT NO. 57101 AND "SURVEY OF LANDS OF WALTER B. & MARY E. NELSON" (WESTERLY SIDE OF TOWN HWY. NO. 45) SHREWSBURY, VERMONT, SCALE: 1"=200', DATED: SEPT. 1981, BY: TINKER SURVEYS, RUTLAND, VERMONT.

Tract 213-24

All that certain tract or parcel of land lying and being situated in the Town of Shrewsbury, Rutland County, State of Vermont, and being more particularly described as follows:

BEGINNING at a point located on the westerly side of Middle Road – TH No. 45, said point being located North 24° 15' 30" West, 645 feet from an "X" chiseled in a large flat rock on the westerly side of said Road, said point being adjacent to a property corner on the easterly side of said Road, which is a corner common to lands formerly of Robert S. Pratt, now lands of the United States of America (Appalachian National Scenic Trail, Tract 213-11) and other lands of said Pratt, now lands of the United States of America (Appalachian National Scenic Trail, Tract 213-15); thence, with the westerly side of said Road, South 24° 15' 30" East, 215 feet to a point; thence, severing the lands of subject owner, with the boundary line of Tract 213-08,

Appalachian National Scenic Trail, South 53° 49' 31" West, 1,846 feet, more or less, to a 5/8" rebar located in the remnants of a wire fence, being a corner common to lands formerly of John J. Walsh, Jr., et ux, now of the United States of America (Appalachian National Scenic Trail, Tract 213-17) and subject owner; thence, again severing the lands of subject owner, North 47° 28' 32" East, 1,902 feet, more or less, to the point of beginning.

Containing 4.46 acres, more or less.

The above-described parcel, designated as Tract 213-24, Appalachian National Scenic Trail, is a portion of the same land acquired by Walter B. Nelson, et ux, from Louis C. Rosato by deed dated August 3, 1981 and recorded August 7, 1981 in Deed Book 25, Page 387, in the Shrewsbury Town Clerk's Office, Rutland County, State of Vermont.

BEARINGS REFER TO VERMONT STATE PLANE COORDINATE SYSTEM.

FURTHER REFERENCE IS MADE TO PLATS ENTITLED "U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, APPALACHIAN NATIONAL SCENIC TRAIL, SURVEY OF TRACT 213-17", DATED: JULY 11, 1985, BY: DUBOIS & KING, INC., RANDOLPH, VERMONT, SCALE: 1"=200', PROJECT NO. 57101 AND "SURVEY OF LANDS OF WALTER B. & MARY E. NELSON" (WESTERLY SIDE OF TOWN HWY. NO. 45) SHREWSBURY, VERMONT, SCALE: 1"=200', DATED: SEPT. 1981, BY: TINKER SURVEYS, RUTLAND, VERMONT.

DEFENDANTS' EXHIBIT B

[SEAL]

United States Department of Interior

NATIONAL PARK SERVICE
APPALACHIAN NATIONAL SCENIC TRAIL
LAND ACQUISITION FIELD OFFICE
P.O. BOX 908
MARTINSBURG, WV 25401

IN REPLY REFER TO: AUG 12 1988
L1425(633)
Re: Tracts 213-08/24

Mr. George W. F. Cook
Attorney-at-Law
Mead Building
Rutland, Vermont 05701

Dear Mr. Cook:

Enclosed is our letter of just compensation along with the offer for Tracts 213-08/24 owned by Mr. and Mrs. Walter Nelson. As we had previously agreed, a copy of the appraisal report prepared by Stephen D. Allen is also enclosed.

I hope you and your clients will find everything in order and return the signed offers as quickly as possible. Please give me a call if I can assist in any way.

Sincerely,

/s/ Donald T. King
Donald T. King
Acting Chief, Land Acquisition Field Office

Enclosures

[SEAL]

United States Department of Interior

NATIONAL PARK SERVICE
APPALACHIAN NATIONAL SCENIC TRAIL
LAND ACQUISITION FIELD OFFICE
P.O. BOX 908
MARTINSBURG, WV 25401

IN REPLY REFER TO:
L1425(633)
Re: Tracts 213-08/24

AUG 12 1988

Mr. and Mrs. Walter B. Nelson
c/o George W. F. Cook, Esquire
Mead Building
Rutland, Vermont 05701

Dear Mr. & Mrs. Nelson:

The appraisal of your property located in the Appalachian National Scenic Trail has been received and approved. Based on this appraisal, we have established just compensation, including severance damage where appropriate, in the following amounts:

TRACT NUMBER	INTEREST TO BE ACQUIRED	VALUE OF INTEREST	SEVERANCE DAMAGE	JUST COMPENSATION
213-08	Fee	$40,500	None	$40,500
213-24	Protective Easement	$13,500	None	$13,500

The total amount of just compensation for all interests to be acquired in your property is $54,000.00.

The above amounts are not less than the approved appraised values which were determined after a thorough review and analysis of the following:

1. The highest and best use of the property.

2. Comparable bona fide sales of properties between private parties, the date of such sales, price paid, location and other physical characteristics.

3. Any increase or decrease in the fair market value prior to the date of valuation caused by this project has been disregarded in making a determination of just compensation.

Enclosed is an Offer to Sell Real Property and an Offer to Sell Easement in the above amounts. If acceptable, please sign and date the forms and have your signatures witnessed where indicated. Retain Copy 6 for your records and return all other copies in the envelope provided. These Offers to Sell will then become binding contracts when accepted on behalf of the United States within the time limit specified in paragraph (1) of the Offers.

Also enclosed is a brochure which will give you general information about potential benefits for which you may be eligible under Public Law 91-646, commonly referred to as the Relocation Act.

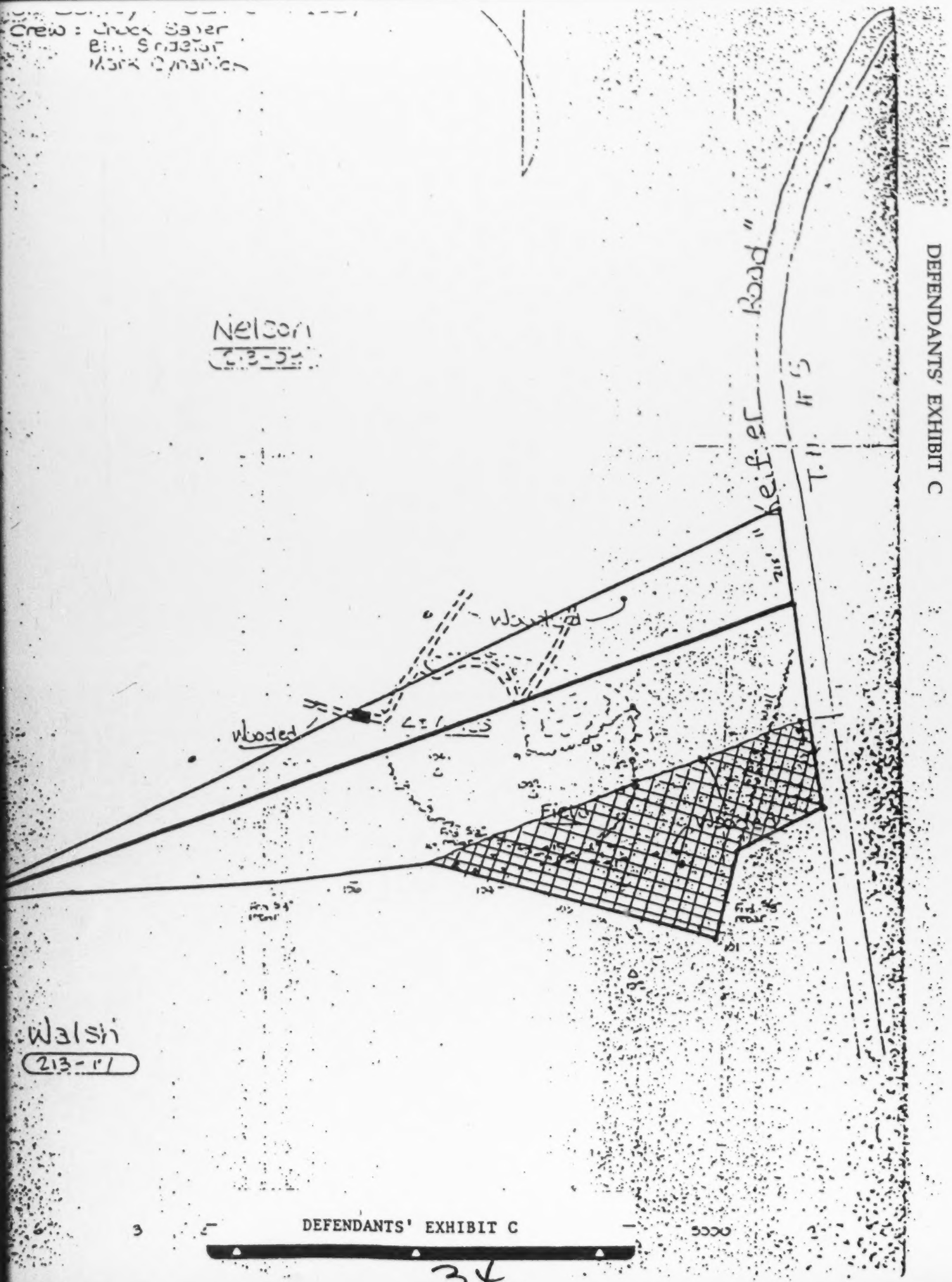
Enclosed, also, is a copy of the title insurance policy which we have obtained on the property. Please inspect Schedules "A" and "B" of this policy so as to verify the information in them and advise us should you find anything contained therein that you question.

Should you have any questions, please contact me at the above address, or call 304/263-4943.

Sincerely,

/s/ Donald T. King
Donald T. King
Acting Chief, Land Acquisition Field Office

Enclosures:
Offers to Sell
Return Envelope
Brochure
Title Policy


DEFENDANTS' EXHIBIT C
Crew : Chuck Sayer
Bill Sproter
Mark Cimarron
Nelson
213-5
Heifer Road
T. 11 S.
Wood
Field
Walsh
213-17
3
DEFENDANTS' EXHIBIT C
5000
34

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Civil No. 90-251
16.03 ACRES OF LAND;	:	
WALTER B. NELSON and MARY	:	
E. NELSON, ET AL	:	

ORDER

On October 30, 1991, defendants Walter Nelson and Mary Nelson filed a motion regarding the trial in the above captioned matter of necessity issues and of compensation issues. This motion is hereby GRANTED, and the trial shall be bifurcated such that a determination will first be made on the extent of condemnation reasonably necessary and then a determination will be made of the appropriate compensation.

SO ORDERED.

Dated in Rutland in the District of Vermont this 17 day of November, 1991.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Civil No.
	:	90-251
16.03 ACRES OF LAND, MORE OR LESS, LOCATED IN RUTLAND COUNTY, VERMONT; WALTER B. NELSON AND MARY E. NELSON, Husband and Wife; TREASURER OF THE TOWN OF SHREWSBURY, VERMONT; and UNKNOWN OWNERS	:	(Filed Mar. 13, 1991)

ORDER

On February 20, 1991, defendants Walter and Mary Nelson moved this court for leave pursuant to Fed. R. Civ. P. 15 to amend their answer. The amendment is for the purpose of reasserting the answer to state affirmatively and accurately certain defenses. The government does not oppose the motion. The court finds that no prejudice to the government would result from the amendment. In view of the fact that leave to amend under Rule 15 is to be liberally granted when justice requires, defendants' motion is hereby GRANTED.

SO ORDERED.

Dated at Rutland in the District of Vermont this 13th day of March, 1991.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
V.	)	
	)	Civil No.
14.60 ACRES OF LAND	)	90-251

AMENDMENT TO PLAINTIFF'S COMPLAINT

The United States of America, plaintiff herein, by and through its attorney, George J. Terwilliger, III, United States Attorney for the District of Vermont, hereby amends the caption of the complaint herein pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to read as follows:

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
	)	Civil No.
v.	)	90-251
	)	
16.03 ACRES OF LAND, MORE	)	
OR LESS, LOCATED IN	)	
RUTLAND COUNTY, VERMONT;	)	
WALTER B. NELSON AND	)	
MARY E. NELSON, HUSBAND	)	
AND WIFE; TREASURER OF	)	
THE TOWN OF SHREWSBURY,	)	
VERMONT; AND UNKNOWN	)	
OWNERS	)	
Defendants	)	

DATED at Rutland, in the District of Vermont, this 18th day of October, 1990.

UNITED STATES OF AMERICA

GEORGE J. TERWILLIGER, III
United States Attorney

By: /s/ John Claude Charbonneau
JOHN-CLAUDE
CHARBONNEAU
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA, Plaintiff, v. 16.03 ACRES OF LAND, MORE OR LESS, LOCATED IN RUTLAND COUNTY, VERMONT; WALTER B. NELSON AND MARY E. NELSON, husband and wife; TREASURER OF THE TOWN OF SHREWSBURY, VERMONT; and UNKNOWN OWNERS, Defendants.	)	Civil No. 90-251 (Filed Sep. 7, 1990)

COMPLAINT IN CONDEMNATION

Plaintiff United States of America, by its attorney George J. Terwilliger, III United States Attorney for the District of Vermont, for its complaint states as follows:

1. This is a civil action brought on behalf of the Secretary of the United States Department of Interior, for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1345 and 40 U.S.C. § 257.

3. The taking of the land is authorized by 40 U.S.C. § 257, 16 U.S.C. § 4601-4, *et seq.*, 16 U.S.C. § 1241, *et seq.*, and the authority of the Department of the Interior and

Related Agencies Appropriations Act, 1988, Public Law 100-202, dated December 2, 1987.

4. The public uses for which the land is to be taken are the proper administration, preservation, and development of the Appalachian National Scenic Trail for the benefit and enjoyment of the public. The land has been selected for acquisition by the United States of America for these purposes, and for such other uses as may be authorized by Congress or by Executive Order.

5. The interest in the property to be acquired is the fee simple title, subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

6. The property to be acquired, identified as Tract No. 213-08, is more particularly described as follows:

TRACT 213-08

All that certain tract or parcel of land lying and being situated in the Town of Shrewsbury, Rutland County, State of Vermont, and being more particularly described as follows:

BEGINNING at an "X" chiseled in a large flat rock located on the westerly side of Middle Road – TH No. 45, said chiseled "X" being a corner common to lands formerly of John J. Walsh, Jr., et ux, now of the United States of America (Appalachian National Scenic Trail, Tract 213-17) and subject owner; thence, with the property line of said Government Lands, the following seven bearings and distances:

South 45° 54' 24" West, 204.0 feet, along remnants of a wire fence, to a 5/8" rebar in a stone wall;

South 02° 38' 25" East, 189.6 feet, along a stone wall and remnants of a wire fence, to a 5/8" rebar at the end of said stone wall;

South 88° 59' 05" West, 605.7 feet, along remnants of a wire fence, to a 5/8" rebar;

South 66° 56' 40" West, 327.5 feet, along remnants of a wire fence, to a 5/8" rebar;

South 68° 34' 10" West, 213.5 feet, along remnants of a wire fence, to a 5/8" rebar;

South 73° 38' 50" West, 208.8 feet, along remnants of a wire fence, to a 5/8" rebar; and

South 67° 55' 05" West, 240.7 feet, along remnants of a wire fence, to a 5/8" rebar, being another corner common to said Government Lands and subject owner; thence, severing the lands of subject owner, North 47° 28' 32" East, 1,902 feet, more or less, to a point on the westerly side of said Middle Road; thence, with the westerly side of said Middle Road, South 24° 15' 30" East, 645 feet to the point of beginning.

Containing 16.03 acres, more or less.

The above-described parcel, designated as Tract 213-08, Appalachian National Scenic Trail, is a portion of the same land acquired by Walter B. Nelson, et ux, from Louis C. Rosato by deed dated August 3, 1981 and recorded August 7, 1981 in Deed Book 25, Page 387, in the Shrewsbury Town Clerk's Office, Rutland County, State of Vermont.

BEARINGS REFER TO VERMONT STATE PLANE COORDINATE SYSTEM.

FURTHER REFERENCE IS MADE TO PLATS ENTITLED "U. S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, APPALACHIAN NATIONAL SCENIC TRAIL, SURVEY OF TRACT 213-17," DATED: JULY 11, 1985, BY: DUBOIS & KING, INC., RANDOLPH, VERMONT, SCALE: 1"=200', PROJECT NO 57101 AND "SURVEY OF LANDS OF WALTER B. & MARY E. NELSON" (WESTERLY SIDE OF TOWN HWY. NO. 45) SHREWSBURY, VERMONT, SCALE: 1"-200', DATED: SEPT. 1981, BY: TINKER SURVEYS, RUTLAND, VERMONT.

7. A Plan showing Tract 213-08 is attached to and made a part of this complaint as Exhibit A.

8. The persons, firms and corporations known to the plaintiff to have or claim an interest in the property are:

Walter B. Nelson and Mary E. Nelson
55 Bowman Drive
Greenwich, Connecticut 06830

Treasurer
Town of Shrewsbury
RR #1
Cuttingsville, Vermont 05783

9. All persons, firms and corporations named as defendants herein are joined so that all of their right, title, interest and estate in and to any and all of the lands herein involved shall be divested out of them and vested in plaintiff.

10. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff, and such persons are made parties to this action under the designation "Unknown Owners."

WHEREFORE, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Trial by jury on the issue of just compensation is demanded by plaintiff.

DATED at Rutland, in the District of Vermont, this 7th day of September, 1990.

UNITED STATES OF AMERICA

GEORGE J. TERWILLIGER, III
United States Attorney

/s/ John Claude Charbonneau
JOHN-CLAUDE
CHARBONNEAU
Assistant U. S. Attorney
P.O. Box 10
Rutland, Vermont 05702
FTS 832-3231
(802) 773-0231

LAND PROTECTION PLAN
for the
APPALACHIAN NATIONAL SCENIC TRAIL

Recommended /s/ David C. Richie
Project Manager,
Appalachian Trail
Date 6/24/83

Approved /s/ STANLEY T. ALBRIGHT
Associate Director,
Park Operations
Date 6/27/83

Update Approved: /s/ STANLEY T. ALBRIGHT
Associate Director,
Park Operations
Date 6/25/86

II THE APPALACHIAN TRAIL

Trail history and significance

The Appalachian Trail is a footpath blazed continuously for 2100 miles from Katahdin in Maine to Springer Mountain in Georgia. It was designed to link together many of the notable natural features of the Appalachian Mountains and to provide recreation for the increasingly urban population of the eastern U.S. From its beginnings in the 1920's, private trail organizations have worked cooperatively with state and federal agencies to locate, build and maintain the footpath and related facilities in a setting appropriate to the conservation and recreational objectives of the Trail.

The Trail was located, where possible, on protected lands in state and national forests and parks, favoring the highest land and taking advantage of features attractive to hikers – viewpoints, mature forests, open fields, waterfalls, streams, shaded ravines and cultural landscapes. Between these public lands, trail clubs obtained agreement from private landowners on the best obtainable route, including small towns and country roads. The result provided a diverse Trail route that introduced hikers not only to wild and scenic natural landscapes but to the people, farms and towns that add richness to the heritage and traditions of the Appalachian Mountain region.

The Trail won widespread attention in the 1950s with feature articles in popular magazines and widely publicized reports of the adventures of the first hikers to walk the whole route in a single season. This attention, recommendations in a nationwide study of outdoor recreation and the growing popularity of hiking and backpacking all contributed to the designation of the Appalachian Trail as one of two national scenic trails in the 1968 National Trails System Act. This designation was actively sought by the Appalachian Trail Conference and other trail groups as a means of protecting the Trail from incompatible development and land ownership changes that jeopardize the continuity and quality of the Trail.

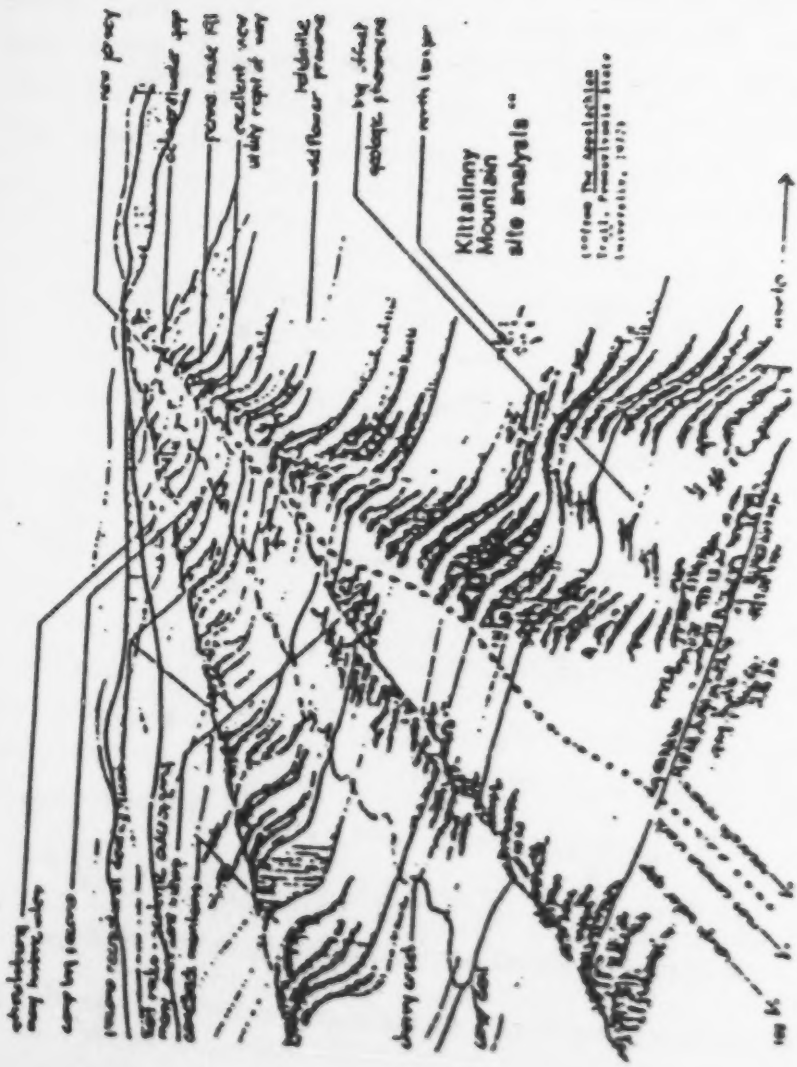
Legislation

The 1968 Trails Act made preservation of the Appalachian Trail a matter of Federal law. The legislated purpose for establishing the Appalachian National Scenic Trail was

"to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural or cultural qualities of the areas through which such trails may pass." (Sec. 3b) While placing primary responsibility with the Secretary of the Interior, the legislation emphasized the cooperative traditions of the Trail. Important provisions included:

- states were given two years following publication of an official Trail route during which no competing federal protection efforts would be undertaken (this two year limitation was removed in 1978),
- in selecting rights-of-way, full consideration was given to minimizing adverse effects on adjacent landowners (Sec. 7a),

App. 63



Planning for Trail Protection

Planning for protection of the Trail has been a careful process. Years have gone into selection of the most viable and scenic route. Steps followed by the Park Service and Forest Service, working with the Appalachian Trail Conference, states and local governments, landowners, and Trail clubs, include:

- Evaluation of present route
- Reviewing new route alternatives where needed and feasible
- Preparation of planning maps by National Park Service
- Discussion with landowners and community
- Environmental assessment of alternatives for relocation
- Survey (after flagging of footpath)
- Title research
- Appraisal of lands
- Negotiations with landowners
- Acquisition of interests in corridor lands
- Construction of new trail (where needed)

Volunteers have had a particularly active role in the first five steps.

From: Protection of Trailway, Appalachian Trail *Comprehensive Plan,* page 22

The objectives of the Trail protection program are:

- to assure that the Trail will be continuous,

- to locate the Trail for good hiking without unduly affecting adjacent land uses,
- to provide separation of the footpath from potential incompatible development, where possible,
- to provide separation for adjacent landowners from recreational uses of the Trail and related facilities,
- to protect nationally significant natural and scenic qualities along the route of the Trail,
- to provide an adequate land base to meet the outdoor recreation objectives of the Act.

Issues

The National Trails System Act requires a balancing of conservation, public recreation, governmental and private interests to achieve Trail protection and use results that are consistent both with National Scenic Trail status and with the cooperative traditions of the Trail. Major issues include:

- Under what circumstances should a relocation of the Trail be made to improve the quality of the Trail route or to reduce conflicts with affected landowners?
- What corridor boundaries should be established to meet Trail protection and compatibility with adjacent land use objectives in the Act?
- What governmentally-owned interests within the corridor boundaries are required to meet

the Trail protection and compatibility objectives in the Act, considering the encouragement the Act provides for using less-than-fee alternatives?

- To what extent should Trail protection objectives include the conservation of "nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass," as directed in Section 3(b) of the Act?
- What private land uses are compatible with National Scenic Trail status?

The accompanying chart provides information about how the National Park Service has addressed these issues. Through application of the principles involved and using the planning process described above, agreement on a specific Trail protection concept has been reached with landowners on most of the remaining unprotected miles the National Park Service is seeking to protect.

TRAIL CORRIDOR PLANNING

Resource	Planning Objectives	Protection Goals
A. Remote Ridgeline or other isolated areas with difficult access.	A. To preserve remote character; to protect native vegetation, wildlife and water sources; to limit vehicle access; to allow only compatible resource utilization; to include sufficient land for a well-designed trail.	A. To acquire permanent interests sufficient to meet objectives, usually a variable width corridor designed to reflect topography and vegetation characteristics – seeking enough buffer for the footpath to avoid intrusions on the Trail experience from adjacent incompatible development.
B. Significant natural area Highlands, lakes and roadless areas with unusual natural or scenic values.	B. To preserve natural and geologic features, vistas, vegetation, wildlife and water quality; to avoid vehicle access; to avoid uses inconsistent with natural values; to preserve outdoor recreation potential of area.	B. To acquire permanent interests in enough land to preserve the character of the area, using natural boundaries to the extent possible.
C. Rural countryside Fields, commercial forests, woodlots, low density residential areas.	C. To accommodate the Trail to existing land uses; to preserve farms and open fields that contribute to the attractiveness and value of adjacent lands; to limit development close to the Trail.	C. To acquire a permanent interest for the Trail in a suitable location and sufficient interests in adjacent lands to encourage continued compatible uses.
D. Connectors Near towns, road crossings, valley crossings – partially developed areas.	D. To provide a safe, reasonably attractive location for the Trail; to limit development close to the Trail; to provide trailhead parking; where applicable, to retain positive cultural experiences for hikers.	D. To acquire a permanent interest for the Trail in a suitable location and sufficient interest in adjacent lands to prevent incompatible development close to the Trail.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA,	Civil No. 90-251
v.	TRIAL BY COURT
16.03 ACRES, more or less, Respondent.	Condemnation Hearing

February 20, 1992
Rutland, Vermont

BEFORE:

HONORABLE FRANKLIN S. BILLINGS, JR., Judge

APPEARANCES:

CHARLES A. CARUSO, ESQUIRE
BY: CHRISTOPHER B. BARIL, ESQUIRE
Assistant United States Attorney

MESSRS. ABELL, KENLAN, SCHWIEBERT & HALL
BY: PETER W. HALL, ESQUIRE
On behalf of the respondent

WILLIAM A. CURRIE III
U.S. Court Reporter
P.O. Box 895
Rutland, Vermont 05702
(802) 775-6411

* * *

[p. 2] DONALD T. KING, Sworn.

DIRECT EXAMINATION BY MR. BARIL:

Q Mr. King, would you tell us where you live and also your occupation, please?

A Yes. I live at 202 Clifford Drive in Martinsburg, West Virginia. My occupation – I'm a realty officer. I'm in charge of the National Parks Service land acquisition program for the Appalachian Trail.

Q Would you explain briefly what your duties are as a land [p. 3] acquisition officer?

A As a land acquisition officer, I'm responsible for an office that does the negotiations for purchase of lands and all the technical requirements from having survey work, title work, and appraisal work done to accomplish the acquisitions.

Q How long have you worked for the Parks Service?

A Since 1969.

Q Have you held the position you described continuously since that time?

A No. I became permanent in this position in 1989. Prior to that, for a year or two I was in an acting capacity. I have been with the Appalachian Trail since 1979.

Q During that period of time from 1979 to the present, are you familiar with the acquisition policies regarding the property long the Appalachian Trail?

A Yes, I am.

Q That is, the Appalachian Scenic Trail?

A Appalachian Scenic Trail.

Q Mr. King, I show you what's been marked as Plaintiff's 1 for identification. Could you review that for me, please?

A This is the land protection plan that has been developed for the Appalachian Scenic Trail.

Q Who prepared that plan?

A The plan was prepared under the direction of our project manager, David Ritchie. It was our staff and staff working [p. 4] on the Appalachian Trail, assisted with some of the support personnel.

Q Is Mr. Ritchie still the project manager?

A No. He has retired.

Q When was the plan prepared?

A It was originally prepared in 1983 and updated in 1986.

Q And who approved the update?

A The update was approved by Stanley Albright, who was an associate director on park operations for the National Parks Service.

Q What is the purpose or what was the purpose of the land protection plan?

A The plan identifies properties within the Appalachian Trail program, and also gives general information about the protection effort, land acquisition statistics, and other information.

Q Does the plan include the entire length of the Appalachian Scenic Trail?

A It includes the program that the National Parks Service is involved in; the National Forest Service also acquires land, so this just deals with the National Parks Service.

Q Does it include land that's in Vermont subject to acquisition under the Act, that is, the National –

A Yes.

Q – Acquisition Act?

* * *

[p. 24] Q Right. But what you set out to buy and what the Parks Service set out to acquire along the trail was property that was necessary to provide passage and to protect the trail. Correct?

A It was property that was necessary to protect the trail, that's correct.

Q And provide passage?

[p. 25] A It provides passage, also.

Q Now, just so it's clear, you understand from this case that the Nelsons are not challenging the necessity with respect to an acquisition that embodies 200 feet of frontage on the roadway on Keiffer Road. Correct?

A From reading the information, I thought they were challenging the entire acquisition. But I did see a proposal along that line in some of the paperwork.

THE COURT: What are they not –

MR. HALL: They're not challenging the necessity of the mapped acquisition, mapped as an attachment to the amended answer, your Honor. It is – it has been drawn in in a crosshatched section that is 200 feet of roadway along –

THE COURT: Well, it isn't on this map, is it?

MR. HALL: No, it's not on that map, your Honor. It's in the pleadings.

THE COURT: Yes. But how can I – What are you talking about here? I'd like to have that pointed out to me.

MR. HALL: Fine.

Q For the purposes of discussion and pointing this out to the Court, I'm going to show you what's been marked as Exhibit B here, Mr. King, and ask if you recognize this as a working drawing prepared in January 1987 from your file of the 16.03 acres.

A I believe it is. I believe the red has been added. I'm [p. 26] not sure that was on our working drawing.

Q That's correct. The red, we'll have some testimony, is the location, the present location, of the trail, and this other red line is one that I want to talk to you about in just a moment. But do you recognize this as a working drawing from your file of the property?

A Yes, sir.

MR. HALL: I would offer that for these purposes and for the purposes of further explanation at the present time.

THE COURT: Is this the same as Exhibit C that's attached to some pleading?

MR. HALL: That's correct, your Honor. That is the exhibit I was referring to attached to our amended answer.

THE COURT: Oh, okay.

MR. BARIL: I have no objection.

THE COURT: And do I understand the cross-hatched part here is the part that the landowner doesn't object to the necessity of taking?

MR. HALL: That's correct.

THE COURT: That's the lower part?

MR. HALL: That's correct, your Honor.

THE COURT: Okay. So that we're only dealing with the remainder. There's another line drawn through it. I don't know what that means.

MR. HALL: Right. We'll have some testimony about that, [p. 27] I suspect. But we're dealing with the remainder portion, which the pleadings here seek to condemn in fee.

THE COURT: Very well. Thank you.

MR. HALL: Your Honor, I believe Mr. Baril said he had no objection to B.

THE COURT: Yes. May be admitted.

(Defendant's Exhibit B, working drawing, was received in evidence.)

Q And I think the Court has in mind the cross-hatched section, but, Mr. King, just so that you understand, this area in Exhibit B bounded on the north by the red line, running through the field, coming south along Keiffer Road, and then bounded by the southern property line of the Nelson property, you understand that the Nelsons aren't challenging the necessity of that taking?

A I do now.

Q I want to take you back to the Parks Service's mission here and what it does when it normally goes out to acquire property through discussions and negotiations with the landowner. Historically, what the Parks Service did was identify tracts that it felt were necessary to provide passage and to protect the integrity of the trail. Correct?

A Yes.

Q And then it went to the landowner in order – in the first instance, to ask the landowner if he or she would be [p. 28] willing to sell that property to the government so that the government could have passage for the trail and provide protection necessary for it?

A That's right. But part of the opening – the original discussions would help us to refine the corridor because a lot of the times we didn't have the benefit of going on the property and we didn't have the benefit of conforming with the existing property lines and we didn't have the benefit of talking to the owner and getting the owner's input. So all of that was part of the process.

Q Okay. In this instance there was an original plan or thought of the Parks Service's mind to condemn some 34 acres, according to 1986 revised plan?

A That was in our acquisition program at that time.

Q And as you understood it, that was lands to the north, was it, on the Nelson property?

A No. My understanding is that would be lands to the south.

Q Okay. Larger than what's proposed now, but in the same general area?

A Yes, sir.

Q There never was a segment map showing that 34-acre acquisition proposed, was there?

A I believe there was.

Q But this would have been way back in '85, '86?

[p. 29] A Should have been '86 at the time the plan was done.

Q Okay. After Parks Service personnel got on – and volunteers got on to the property and looked at it, they decided that less acreage would suffice to protect the trail. Correct?

A Yes. We revised our plans after various input.

Q The Parks Service doesn't look to get less land than it needs to protect the integrity of the trail, does it?

A We try not to.

Q And you know from the statute that gives you your authority to condemn that if the landowner's only

willing to give you so much but you feel you need more than that, you can go out and condemn it, if it's necessary to protect – to provide passage across the land. Correct?

A I understood that some of the statute includes reasonably necessary for passage in the secretary's judgment.

Q Okay. But all in all, when you're looking to get land from the landowner before condemnation proceedings, you're looking for that portion of land which is necessary to provide passage and necessary for the protection of the trail. Correct?

A Yes.

Q And you don't want less than that?

A Well, I'm not saying we never made any mistakes, and that's true, Mr. Hall, so –

[p. 30] Q But your intention is not to get less. Correct?

A We would like to acquire what we believe is necessary to protect the trail.

Q Mr. Baril asked you some questions about Exhibit 1 and the purposes here. I just want to highlight a couple of things from your observation and knowledge of this document, which is the land protection plan.

Referring to page 3 at the bottom, one of the things that the plan notes is that "It's an important provision of the statute that in selecting rights-of-ways, full consideration was given to minimizing adverse effects on adjacent landowners." Correct?

A Yes.

THE COURT: Where is this?

MR. HALL: I'm sorry. At the bottom of page 3, your Honor, last two lines.

THE COURT: Oh, yes. I see it.

Q And so in determining a corridor and determining what acquisitions are to be made, you're under an obligation to select a right-of-way that does minimize the adverse effect on adjacent landowners. Correct?

A We attempt to minimize impacts or effect on landowners. I think this was referring to the original selection of a route. So it may be a bit out of context, Mr. Hall. But we do attempt – we try to minimize the impacts to the extent [p. 31] that we can, while still fulfilling our goals.

Q Referring to page 6 of Exhibit 1, that's a portion of the plan that talks about the objectives of the trail protection program. Correct?

A Yes. Uh-huh.

Q And you want "to assure that the trail will be continuous." Correct?

A Yes.

Q You want "to locate the trail for good hiking without unduly affecting adjacent land uses"?

A Yes.

Q You want "to provide separation of the footpath from potential incompatible development, where possible"?

A Yes.

Q You want "to provide separation for adjacent landowners from the use of the trail and related facilities"?

A Yes.

Q The other two I don't think we're looking at – are we talking about a "nationally significant, national and scenic quality" in this particular area out here at the Nelson property?

A I'm not sure of the national significance.

Q Okay. You've seen the view, and it's a very pretty view, is it not?

A Yes. I do think it could fall under the last one, "to [p. 32] provide an adequate land base to meet the outdoor recreation objectives of the Act."

Q Okay. In this area that we're talking about where the trail runs alongside the Nelson property and is proposed to cross a portion of it, the outdoor recreation objectives of the Act are, really, to provide hiking access for persons to walk roughly north/south along the trail. Correct?

A Hiking access and a land base to have those scenic qualities preserved and managed. So more than just a footpath, it's an adequate land base or a corridor.

Q Now, would you agree with me, generally, that an important objective for the Appalachian Trail to accomplish is to provide a wilderness hiking experience?

A The trial is not all wilderness, no.

Q But in this area it is wilderness, and that's what you're trying to preserve here. Correct?

A I wouldn't say it was wilderness in that area.

Q Well, would you call it rural?

A I would – I would call it rural, I guess.

Q Turning to page 8, there are some guidelines for rural, countryside, correct, down at paragraph C?

A Yes. It gives some brief explanations of some planning objectives and planning – and in planning protection goals.

Q Okay. Doesn't set a particular designated width or right-of-way that needs to be acquired in order to accomplish [p. 33] those, does it?

A I don't recall reading one in there.

Q Now, Mr. King, continuing beyond 1987, which I think is the point that Mr. Baril got to in terms of what you were negotiating with the Nelsons, the Parks Service and your office was willing to acquire less than the 16.03 acres in fee, was it not?

MR. BARIL: Your Honor, I would object to the question. It's an offer of compromise afterwards, submitted for condemnation. I don't think it's admissible under the rules. I think it's rule 408.

MR. HALL: Your Honor, my point on that, and the reason I belabored, perhaps, the testimony from Mr. King a moment ago about what the Parks Service wanted to acquire, is his testimony that the Parks Service's objective was not to – or unless it was making some mistake,

not to acquire less land than was reasonably necessary to provide passage and to protect the trail.

Our offer of proof will show that notwithstanding the efforts to condemn in fee here, and this action was brought after a failed negotiation as we have pleaded, in fact, there was an offer letter that's attached as Exhibit A, and I believe Exhibit B to our amended answer would show that the government offered – felt, at least by the terms of its offer, that a portion of the lands, 11.57 acres, the lines [p. 34] aren't on here, but they are on the Exhibit B here, that's what these will represent . . .

THE COURT: That's what those two lines –

MR. HALL: On Exhibit B. But we don't have testimony on that.

THE COURT: I understand.

MR. HALL: That that 11.57 acres in fee, and that a remainder of 4.46 acres in a protected easement were sufficient to protect the trail.

And Mr. King's testimony – I'm sorry.

THE COURT: Do you have anything further? I'm going to rule on this objection. We'll sustain the objection as far as prior negotiations are concerned. But we're going to allow the question, because as we read page 10 of the plan, it indicates that easements may be acquired in order to, I guess, meet the needs of the public and the landowners. And we think that's an affirmative defense as to whether they need to take in fee or by easement.

MR. BARIL: Just to clarify my objection, I understand the landowner may feel that, you know, a lesser taking is appropriate. And I don't quarrel with that. I just want to make sure that the Court – our objection goes to the offer of settlement and the negotiations.

THE COURT: Well, that's – I agree with you. Under the rules, that's not relevant. This is a Court hearing, so it [p. 35] doesn't really make any difference.

MR. BARIL: Yes. I understand.

THE COURT: But, nevertheless, I think it is appropriate to go into in view of the indications of easement plans and whether that's a lesser taking which, in effect, it would be, by taking by easement rather than fee.

MR. BARIL: Yes, I agree with that. I just didn't want it to be an admission on our part that that's appropriate.

THE COURT: No. I understand.

MR. BARIL: Thank you, your Honor.

THE COURT: Go ahead.

Q Mr. King, I guess what I'll do is start over here.

There are circumstances under which a protective easement will accomplish the kind of protection your office wants for the Appalachia Trial. Correct?

A Correct.

Q And, in fact, at least a 4-plus acre, 4.46-acres protective easement was a – would provide protection

that your office considered adequate for protection of the trail, this section here. Correct?

A I – we did offer a settlement or we did offer to acquire as a compromise the fee easement scenario. And I believe it was 4 acres, plus or minus the easement, yes, sir.

Q Okay. Mr. King, I want to get back to that, I guess, [p. 36] because you weren't in any discussions with the landowners seeking to get from them at any time less than what you felt protected the trail. Were you?

MR. BARIL: Your Honor, I'm going to object to the question. What – what the question is attempting to do is get an admission that an offer of compromise was appropriate under the Act as an admission on our part that a lesser taking was –

THE COURT: We'll sustain the objection on that part of it. But we think it's perfectly appropriate to go into if a lesser taking is appropriate to accomplish the purposes of the Act that's in the plan.

MR. HALL: Okay. Could you repeat the question, please?

(The pending question was read back by the reporter.)

Q Let me ask you, Mr. King, a less – and I'll put it to you directly. A lesser taking in this matter would accomplish the purposes of the Act, would it not?

A I would say we proposed a compromise of the fee and the easement as a settlement, and, yes, we would have accepted that as what we would acquire.

Q And that would, for your purposes, accomplish what you sought, what the office had as its mission, to provide a passageway for the trail and to provide protection for that passageway. Correct?

A We –

[p. 37] MR. BARIL: Your Honor, I'm still going to object to the question and answer. This is as part of an offer to compromise and I think the rule is directly on point. You know, when two parties are far apart and they try to work out their differences, the rule attempts to prevent this kind of line of questioning to encourage settlement and negotiation. That's what occurred.

THE COURT: We sustain the objection as far as the settlement negotiation is concerned. We think it is very relevant as to whether a lesser taking is appropriate in accomplishing the purposes of the Act.

Now whether they at one time offered something else is immaterial. That isn't here. Maybe they only should take one acre. I don't know. And certainly you can advance that, if you have any evidence as to that.

MR. HALL. Right. Well, I think we conceded it would come out to about 3.8 acres already, your Honor. And so –

THE COURT: Go ahead.

Q Do you have my question in mind?

A No, sir, I don't. I'm sorry.

Q Let me just ask you. You've already said that a fee taking of a portion and a condemnation of the balance

would accomplish the purposes of the Act, would it not, that is, provide protection for the trail?

A I said we would have accepted that as a compromise [p. 38] proposal, and that would have protected the trail.

Q And I'm asking –

THE COURT: Well, that isn't the answer to the question. We'll strike the answer and read the question to him again, if he can answer it.

(The last question was read back by the reporter.)

A Yes. What I was trying to say is that proposal would have provided for the trail.

Q And it would provide protection for the trail. Correct?

A Yes.

Q And it would provide today protection for the trail that accomplishes the purposes of the Act. Correct?

A I would say we would accept that –

Q No. Please just listen to my question.

A Okay.

Q Today, would a fee taking of – and I'm going to use the number now of 11.57 acres – and an easement of 4.46 acres accomplish a protection of the trail out there at the Nelson property?

A I guess I was trying to answer your question as directly as I could, and that's where I'm having a – we

wouldn't have designed that as what we would – we would want, but we would – I mean, I would say today we would accept that.

Q All right. But it provides the protection necessary for the trail?

[p. 39] A It would resolve the issue, I would think, to everybody's – yes. I would say it provides protection and it resolves the issue.

Q And it would provide the passageway the National Parks Service would want for the Appalachian Trail through that space?

A Well, passage and protection.

Q Right.

THE COURT: That being true, why are we here?

MR. HALL: We're going to argue for a lesser amount, your Honor.

THE COURT: Oh, okay. I thought that was – go ahead.

MR. HALL: I think we've only gotten down to an 11-acre taking, and we're –

THE COURT: I understand that.

Q Mr. King, let me ask you, would a – well, generally, 11 acres, slightly under 11-acre taking, also provide reasonably necessary passage and protection for the integrity of the trial, having in mind the configuration of the Nelson property out here and the property across the

road, the former Robert Pratt property, and the visits and everything else?

A You're talking about our last offer of settlement?

Q No. I'm trying to stay away from that.

A I mean, that was the context that was made, was an offer [p. 40] of settlement.

Q No. We're not getting into that. I just want to ask you, as we sit here today, a 10.95-acre taking would accomplish what is reasonably necessary for passageway of the footpath and to protect the corridor and maintain the values set out here and the objectives set out here in your land protection plan, Exhibit 1?

A Well, I don't think I made that judgment. And I didn't go back to the people that made the judgment that the 14.6 was reasonably necessary in that approval process. And we had discussed that as a means to settle the condemnation, and that was – that was the spirit that it was being used.

Q Well, as you're sitting here today, can you tell me whether a 10.95-acre condemnation gets us – gets the government what is really necessary to protect the trail out there?

A We would have accepted that.

Q And you would accept that –

A I would accept that right at this moment, at least I would recommend accepting it right at this moment.

Q Because –

THE COURT: Maybe we ought to recess –

A (Continuing) As I did –

THE COURT: – and you call – excuse me.

THE WITNESS: No. I'm just saying, as I did this [p. 41] morning, I would accept that as a reasonable compromise.

THE COURT: Do you want to –

MR. HALL: We're trying to stay away from the compromise language.

THE COURT: I understand that. But do you and Mr. Baril want to have a little time to go out and visit or not?

MR. BARIL: Take about ten minutes?

MR. HALL: Ten minutes.

THE COURT: Why don't we take our morning recess.

(There was a recess taken.)

THE COURT: All right. Mr. Hall, you may proceed.

MR. HALL: Thank you, your Honor.

Q Mr. Nelson, before we took our break, I believe you said that an amount, and I – I want to put it this way, of 400 feet of road frontage on Keiffer Road and coming back to the apex here on the east – excuse me – on the west side of the property, which is approximately 11 acres, 10.95 acres, would be adequate to provide – have

the passage and to provide a corridor that would, today, protect the areas that are trying to be protected. Correct?

A And I said we would accept that. And –

Q You would accept that?

A Yes. And while it isn't what we wanted or we've sought to begin with, we would accept that as a settlement.

Q Well, I'm just – I'm staying away from the settlement [p. 42] here. And I want to make it clear that I'm not asking you about settlement. I'm saying, isn't that amount of acreage and that road frontage adequate to protect the values that you want to protect for the trail and to protect the corridor and to provide passage for the trail, as we sit here?

A Yes. What I would – trying to answer your question the best I can. We would accept that as protection for the trial [sic] –

Q Okay.

A – to resolve the issue.

Q And you would accept it as a protection for the trail. Correct?

A Yes, we would accept it.

* * *

Supreme Court, U.S.
FILED
DEC 19 1994
OFFICE OF THE CLERK

No. 94-701

In the Supreme Court of the United States

OCTOBER TERM, 1994

WALTER B. NELSON AND MARY E. NELSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

ROBERT L. KLARQUIST
JACQUES B. GELIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Section 7(g) of the National Trails System Act, 16 U.S.C. 1246(g), authorizes the Secretary of the Interior to utilize condemnation proceedings to acquire lands and interests in lands that "in his judgment" are "reasonably necessary" to provide trail passage across such lands. The question presented is whether the Secretary exceeded the scope of that authority or abused his discretion by condemning, for the Appalachian Trail, 16.03 acres formerly owned by petitioners.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Berman v. *Parker*, 348 U.S. 26 (1954)	9, 10
Cincinnati v. *Vester*, 281 U.S. 439 (1930)	8
Shoemaker v. *United States*, 147 U.S. 282 (1893)	10
United States v. *18.67 Acres of Land*, 793 F. Supp. 582 (M.D. Pa. 1992)	10, 11
United States v. *Gettysburg Elec. Ry.*, 160 U.S. 668 (1896)	10
United States ex rel. TVA v. *Welch*, 327 U.S. 546 (1946)	8, 9
Webster v. *Doe*, 486 U.S. 592 (1988)	7

Constitution, statutes and regulations:

U.S. Const. Amend. V	4
Act of Feb. 11, 1895, ch. 80, 28 Stat. 44	10
§ 1, 16 U.S.C. 430g	10
§ 2, 16 U.S.C. 430g-5 (Supp. V 1993)	11
§ 2(a), 16 U.S.C. 430g-5(a) (Supp. V 1993)	11
National Trails System Act, Pub. L. No. 90-543, 82 Stat. 919, 16 U.S.C. 1241 *et seq.*	2
§ 2, 16 U.S.C. 1241	4
§ 2(a), 16 U.S.C. 1241(a)	2
§ 5(a)(1), 16 U.S.C. 1244(a)(1)	2, 3
§ 7(e)-(g), 16 U.S.C. 1246(e)-(g)	3
§ 7(g), 16 U.S.C. 1246(g)	2, 3, 4, 5, 6, 7, 9, 10, 11

Statutes—Continued: Page

National Trails System Act, Pub. L. No. 95-248, 92 Stat. 159:
§ 4, 92 Stat. 160, 16 U.S.C. 1246(g) 3, 4, 5, 6, 7, 9, 10, 11
§ 5(a)(1), 92 Stat. 160, 16 U.S.C. 1249(a)(1) 3
Tennessee Valley Authority Act of 1933, 16 U.S.C. 831 *et seq.*:
16 U.S.C. 831c(i)..... 9
16 U.S.C. 831x 9

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-701

WALTER B. NELSON AND MARY E. NELSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 26 F.3d 349. The opinion of the district court (Pet. App. 30-34) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28-29) was entered on June 14, 1994. A petition for rehearing was denied on July 13, 1994. Pet. App. 26-27. The petition for a writ of certiorari was filed on October 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 7(g) of the National Trails System Act, 16 U.S.C. 1246(g), provides in pertinent part:

> The appropriate Secretary [of the Interior or Agriculture] may utilize condemnation proceedings without the consent of the owner to acquire private lands or interests therein pursuant to this section only in cases where, in his judgment, all reasonable efforts to acquire such lands or interests therein by negotiation have failed, and in such cases he shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands: *Provided*, That condemnation proceedings may not be utilized to acquire fee title or lesser interests to more than an average of one hundred and twenty-five acres per mile. * * *

STATEMENT

1. In 1968, Congress passed the National Trails System Act (the Trails Act or the Act), Pub. L. No. 90-543, 82 Stat. 919, codified at 16 U.S.C. 1241 *et seq.*, in an effort "to provide for the ever-increasing outdoor recreation needs of an expanding population and * * * to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation." 16 U.S.C. 1241(a). The Trails Act designates the Appalachian Trail (the Trail), extending approximately 2,000 miles along the Appalachian Mountains from Mount Katahdin, Maine, to Springer Mountain, Georgia, as a national scenic trail. 16 U.S.C. 1244(a)(1). The Trails Act vests primary responsibility for administering the Appalachian Trail in the Secretary of the Interior (the Secretary), in consultation with the Secretary of

Agriculture, 16 U.S.C. 1244(a)(1), and gives the Secretary the power to acquire lands by voluntary sales, exchanges of property, or condemnation. 16 U.S.C. 1246(e)-(g).

In 1978, Congress amended the Trails Act to (1) increase the amount of land the Secretary was authorized to acquire by condemnation to 125 acres per mile of trail; (2) allow acquisitions to include up to an average of 125 acres per mile of trail; and (3) expand the budget for land acquisitions from $5 million to $30 million for each of the fiscal years 1979 through 1981. National Trails System Act, Pub. L. No. 95-248, §§ 4, 5(a)(1), 92 Stat. 160 (codified as amended at 16 U.S.C. 1246(g), 1249(a)(1)). The 1978 amendments to the Act eliminated the requirement that the land taken be "the most direct or practicable connecting trail right-of-way," while retaining the requirement that the Secretary judge the condemnation to be "reasonably necessary to provide passage across such lands." Compare § 7(g), 82 Stat. 924, with § 4, 92 Stat. 160.

2. In 1983, the National Park Service entered into negotiations, pursuant to 16 U.S.C. 1246(g), to acquire 34.38 acres in Rutland County, Vermont, from petitioners. The Park Service determined that the acquisition was necessary to move the Trail from the roadside to a more suitable corridor, which would provide views and permanently protect the Trail. During negotiations, the Park Service reduced the amount of land it sought to 16.03 acres, but the parties failed to reach agreement on the purchase price. Pet. App. 5.

3. On September 7, 1990, the United States, on behalf of the Secretary, filed a complaint in condemnation to acquire fee title to the 16.03 acres. Pet. App. 55-59. The complaint averred that the public uses for which the land was taken were the "proper administration, preser-

vation, and development of the Appalachian National Scenic Trail for the benefit and enjoyment of the public." Pet. App. 56, ¶ 4.

Petitioners' answer raised five defenses. Pet. App. 36-50. First, they maintained that 4.46 of the acres were taken in fee instead of by easement as a result of the "bad faith, vindictive, arbitrary and capricious actions of administrative personnel" at the Appalachian National Trail Land Acquisition Office in West Virginia. *Id.* at 36-37, ¶ 1. In support of that allegation, petitioners noted that the acquisition office had originally negotiated a taking in fee of 11.57 acres and a taking by way of easement of 4.46 acres, and that the Government's proposed award of compensation was based on that arrangement. *Id.* at 37, ¶ 1.A, 1.B. In addition, petitioners alleged that the condemnation action seeking all 16.03 acres in fee was made to punish petitioners for refusing to accept the offered compensation. *Id.* at 37, ¶ 1.C. Second, petitioners asserted that the taking violated the Trails Act, 16 U.S.C. 1241 and 1246(g). Pet. App. 38, ¶ 2. Third, petitioners argued that the taking of 16.03 acres in fee violated the Fifth Amendment because, *inter alia*, the taking was not for a "public purpose" but rather was for the purpose of punishing petitioners. Pet. App. 38, ¶ 3. Fourth, petitioners asserted that the "condemnation of said 4.46 acres in fee, instead of by way of easement, is not necessary to comply with the intent and meaning of the applicable federal statute, but is wholly unnecessary to comply with the same." *Id.* at 38, ¶ 4. Fifth, petitioners alleged that the taking of the entire 16.03 acres "is far more acreage than 'is reasonably necessary to provide passage across' the lands of the defendants, and a much lesser taking * * * will provide a width of corridor for the trail where it now

exists which is wholly adequate 'to protect the integrity of the Tr[ai]l.'" *Id.* at 38-39, ¶ 5.

4. The district court held a bifurcated trial, first on the government's right to take the property, and then on the amount of just compensation. At the first hearing, petitioners took the position that the Park Service was entitled to acquire only 6.71 acres in fee simple. Gov't C.A. Br. 8. The government responded that the court could review the agency decision to condemn the 16.03 acres only to determine whether the condemnation was for a "public purpose" and to determine whether the Secretary had exceeded his authority under the Act's limitation of condemnation to an average of 125 acres per mile. *Ibid.*

The officer in charge of the Park Service land acquisition program for the Appalachian Trail, Donald T. King, testified that, under the Land Protection Plan prepared for the Trail (Pet. App. 60-67), the Park Service originally planned to acquire a 34-acre parcel from petitioners. Gov't C.A. Br. 8-9. King also testified that he would have accepted a compromise taking of 10.95 acres as a reasonable settlement of the controversy during the negotiation period. Pet. App. 86. He expressed the view that a 10.95-acre parcel would be adequate to protect the trail, but acknowledged that other experts could have different views on the appropriate amount of land to take. Gov't C.A. Br. 9.

5. The district court held that 16 U.S.C. 1246(g), which provides that the Secretary "shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands," means that the government "must attempt to take only the minimal interest in land that will accommodate the protection of the trail and passage across lands, having in mind a minimum impact on the landowner by the taking." Pet.

App. 33. The court placed the burden on the government to prove, by a preponderance of the evidence, that the 16.03 acres it sought were reasonably necessary for those purposes. *Ibid.* Then, concluding that the government failed to carry that burden, the court allowed the condemnation in fee of only 6.7 acres, and, in a subsequent trial, determined that the value of the 6.7 acres was $23,450. *Id.* at 25.

6. The court of appeals reversed. Pet. App. 1-24. It held that a court considering a challenge to a condemnation decision by the Secretary should determine "whether the delegated officials acted in conformity with their legislative grant of authority" and whether the manner in which the Secretary exercised that authority was arbitrary, capricious, or in bad faith. *Id.* at 14. The court of appeals explained that under the latter standard, a reviewing court may not substitute its judgment for that of the Secretary, but rather may determine only whether the Secretary based his decision on a consideration of the relevant statutory factors, and may set aside the decision only if his conduct was so egregious that the taking can serve no public use. *Id.* at 15.

In this case, the court noted that the broad discretion granted to the Secretary by 16 U.S.C. 1246(g) to acquire property is limited by three specific factors. The Secretary must engage in negotiations with the landowner prior to filing condemnation proceedings; he may acquire only such title as, in his judgment, is reasonably necessary to provide passage; and he may condemn an average of only 125 acres per mile. Pet. App. 16-18.

Reviewing the Secretary's decision against those limitations, the court of appeals held that the district court had erroneously relied on the opinions and testimony of the landowners and the government's

witness in making its determination of whether the condemnation of 16.03 acres in fee was reasonably necessary to protect the trail, rather than reviewing the Secretary's decision to acquire the 16.03 acres to determine whether he had abused his discretion. Pet. App. 22-24. Because nothing in the record suggested that the Secretary violated the statutory guidelines in Section 1246(g), the court held that the decision to condemn 16.03 acres in fee was proper. *Id.* at 24. Accordingly, the court of appeals remanded the case for the district court to determine the amount of just compensation for the property the United States had lawfully sought to condemn. *Ibid.*

ARGUMENT

The court of appeals correctly held that the Secretary of the Interior did not abuse his discretion in deciding to acquire 16.03 acres of land in fee from petitioners for the Appalachian Trail. That fact-bound decision does not warrant review.

1. Petitioners are correct that "the Act is neither silent nor ambiguous regarding what land can be condemned by the Secretary for use of the Trail." Pet. 11. Under 16 U.S.C. 1246(g), the Secretary is authorized to acquire "only such title as, in his judgment, is reasonably necessary to provide passage across such lands." The language "only such title as * * * is reasonably necessary to provide passage" establishes the boundaries of the Secretary's takings authority. The phrase "in his judgment" modifies that language, explaining how that determination is to be made. Compare, *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988). The text of the Act thus expressly commits the determination of what lands and title are "reasonably necessary" to the judgment and discretion of the

Secretary. The court of appeals properly held that the Secretary's decision is reviewable only for abuse of discretion and that no such abuse was committed here. Pet. App. 14-15, 22-26.

2. There can be no doubt that the 16.03 acres have been taken for a public use. Petitioners' reliance (Pet. 12) on *Cincinnati* v. *Vester*, 281 U.S. 439 (1930), for the proposition that "[t]he condemnation of a private person's land should not be sustained on a 'bare recital' that such land needs to be taken" is misplaced. In *Vester*, a landowner challenged the City of Cincinnati's condemnation of an allegedly excessive amount of land on the ground that the taking was not accomplished in accordance with the applicable provisions of the Constitution and statutes of Ohio. This Court understood it to be "the rule in Ohio, as elsewhere, that the power conferred upon a municipal corporation to take private property for public use must be strictly followed," and concluded that the City had failed to specify the public purpose of the excess appropriation at issue, as required by state law. 281 U.S. at 448. This case, unlike *Vester*, raises a question of federal law. Congress has defined the public purpose justifying the acquisition of property for the Appalachian Trail pursuant to the Trails Act, and has entrusted the Secretary with the responsibility to implement that purpose.

Determinations of public use and the applicable standard of review were examined further in *United States ex rel. TVA* v. *Welch*, 327 U.S. 546 (1946). Sustaining the Tennessee Valley Authority's authority to condemn six tracts of land that were flooded when the Fontana dam was built, this Court wrote: "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized

to do the taking may do so to the full extent of its statutory authority." 327 U.S. at 551-552. Because "Congress authorized the Authority to acquire, hold, and use the lands to carry out the purposes of the T.V.A. Act," the Court held that the TVA took the six tracts at issue for a public purpose. *Id.* at 552. The TVA Act contains a provision empowering the TVA to condemn "all property that it deems necessary for carrying out the purposes of the Act." See 16 U.S.C. 831c(i) and 831x. As in the instant case, Congress explicitly committed the decision regarding what lands are necessary for those purposes to the discretion of the agency charged with administering the Act. This Court has since explained that *Welch* stands for the proposition that "[t]he role of the judiciary in determining whether [the power of eminent domain] is being exercised for a public purpose is an extremely narrow one." *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

3. After a reviewing court has established that a taking has been made for a public purpose, any further review of the particulars of the agency's decision must be based on limitations in the language of the particular enabling statute. In this case, 16 U.S.C. 1246(g) requires only that the Secretary engage in negotiations prior to initiating condemnation proceedings; that he condemn only an average of 125 acres per mile; and that he acquire only such title as, in his judgment, is reasonably necessary to provide passage. Only the last consideration is at issue here. "The adjudicated cases * * * establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such

use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made." *Shoemaker* v. *United States*, 147 U.S. 282, 298 (1893). See also *United States* v. *Gettysburg Elec. Ry.*, 160 U.S. 668, 685 (1896) ("The use for which the land is to be taken having been determined to be a public use, the quantity which should be taken is a legislative and not a judicial question."). As this Court admonished in *Berman* v. *Parker*, 348 U.S. at 35-36:

> The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. * * *
>
> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.*

---

* *Berman*, like the instant case, involved a statute that committed condemnation authority to the discretion of an agency, unlimited by any requirement other than the public purpose defined by the statute. Both the Act at issue in *Berman* and 16 U.S.C. 1246(g) were discussed in *United States* v. *18.67 Acres of Land*, 793 F. Supp. 582 (M.D. Pa. 1992), which considered a challenge to a condemnation accomplished pursuant to the Act of Feb. 11, 1895, ch. 80, § 1, 28 Stat. 44, 16 U.S.C. 430g (Gettysburg Act), which involved the Gettysburg National Military Park. The court held that given the "public use and the specific congressional approval for the taking of property within the Park boundary, this court has no jurisdiction to review the Secretary's decision that the 18.67 acre * * * tract is necessary for the administration, preservation and development of the Park." *18.67 Acres of Land*, 793 F. Supp. at 586.

Consequently, petitioners' contention (Pet. 15) that "[t]he courts cannot simply acquiesce to the government's unsupported assertion that a certain parcel of land is necessary for the trail," is wide of the mark. Because the taking here is unquestionably for a public purpose, the court of appeals properly deferred to the Secretary's judgment, exercised pursuant to express delegation by Congress, regarding the acquisition of title reasonably necessary to provide passage across petitioners' land.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

ROBERT L. KLARQUIST
JACQUES B. GELIN
Attorneys

DECEMBER 1994

The court determined, however, that it could review the Secretary's decision to take a fee simple interest rather than some lesser interest in the land. A provision of the Gettysburg Act instructs that "the Secretary shall acquire the minimum Federal interests necessary to achieve the objectives identified for specific areas and the park." 16 U.S.C. 430g-5(a) (Supp. V 1993). The court distinguished Section 430g-5 of the Gettysburg Act from 16 U.S.C. 1246(g), at issue here, noting that the "in his judgment" language of the Trails Act constitutes "an express delegation of discretionary decision-making power to the Secretary." *18.67 Acres of Land*, 793 F. Supp. at 587. The court also distinguished the Act at issue in *Berman* as one that "contained no limiting language such as that contained in 16 U.S.C. § 430g-5(a)." 793 F. Supp. at 588.